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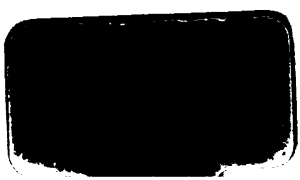

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MASSACHUSETTS REPORTS

146

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

JANUARY 1888 — MAY 1888

WILLIAM V KELLEN

REPORTER

BOSTON

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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. MARCUS MORTON, CHIEF JUSTICE.
HON. WALBRIDGE A. FIELD.
HON. CHARLES DEVENS.
HON. WILLIAM ALLEN.
HON. CHARLES ALLEN.
HON. OLIVER WENDELL HOLMES, JR.
HON. MARCUS P. KNOWLTON.

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HON. ANDREW J. WATERMAN.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

JAMES A. PICKERT *vs.* CHARLES N. HAIR.
THOMAS PHILLIPS *vs.* SAME.

Worcester. October 3, 4, 1887. — January 7, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Evidence — Attorney — Admission.

In an action by A. against a deputy sheriff for the conversion of goods, attached by him as the property of B., B. testified that the goods had belonged to his mother, who had sold them to A., and that he, B., was the general manager of the business in which the goods were used. There was also evidence that, immediately after the attachment, B. consulted C., a lawyer, who afterwards brought this action. The defendant offered to show that on the evening of the attachment C. called on the lawyer who brought the action on which the goods were attached, and said that B. represented to him that D. owned the goods. *Held*, that the evidence was inadmissible for the purpose either of contradicting B., or of showing an admission which was binding on A.

TWO ACTIONS OF TORT. The first case was for the conversion of certain articles of personal property, and the second case was for the conversion of a sum of money. The defendant, a deputy sheriff, justified in each case, by virtue of an attachment of the articles as the property of Rozel F. Pickert and Hattie E. Pickert.

The cases were tried together in the Superior Court, before *Aldrich*, J., who allowed a bill of exceptions, in substance as follows:

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In August, 1883, a shop was opened in Worcester for the sale of tea and coffee, inducements being advertised and offered to buyers, in the shape of prizes or gifts of more or less value, put up in the packages of tea and coffee. The name in which the business was conducted was the "Importers Tea Company." The manager of this shop was the plaintiff Phillips, and he had under him several clerks. The Importers Tea Company had been in existence under that name for several years, and had shops, for a few weeks or months at a time, in each of a large number of cities and towns all over the country, and there were several shops running at the same time that this one in Worcester was in operation. Rozel F. Pickert and his wife were indebted to certain New York merchants, who caused an attachment to be made by the defendant of the stock, &c. of the Importers Tea Company in Worcester, including money displayed in the shop window to attract attention, contending that the owners and proprietors of the Importers Tea Company were said Pickert and wife. The plaintiff James A. Pickert claimed to be the owner of the attached property, except $150, and to carry on, and to be the person doing business as, the said company. Thomas Phillips claimed the $150, not claimed by James A. Pickert, which was part of some $450 in bills, taken from the shop window.

Evidence for the plaintiffs tended to show that Rozel F. Pickert had organized this general business as the agent of his mother, and with his mother's funds, in 1879, and had always been the general manager of all the shops of the Importers Tea Company, conducting and directing the whole business until the spring of 1883, when his mother sold the business to his brother, James A. Pickert; and that thereafter said R. F. Pickert acted in the same capacity for his brother, who was living in Dakota on a farm, and, as such general manager conducting the business, established the Worcester store. Both R. F. Pickert and Thomas Phillips were witnesses, and testified to these facts, Pickert in detail, and Phillips in a general way, to the ownership by James A. Pickert, and to the general management by R. F. Pickert.

Evidence for the defendant tended to show that R. F. Pickert and his wife were the real owners of this business and property,

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and that the sale to James A. Pickert was a pretended transfer, and was colorable only, and this issue was submitted to the jury.

Thomas Phillips, called by the plaintiffs as the first witness, testified that the attachment took place on September 6, 1883; that one Cleveland was left in the shop by the defendant, as a keeper; that he, Phillips, notified R. F. Pickert of the attachment, by telegram to Providence, Rhode Island, where he then was; that he came up the same day or evening, he thought; that they consulted together in the shop, in relation to the attachment; that he, Phillips, did not go to see counsel with Pickert, but he thought a clerk named Wilson was the person who went; that he did not remember clearly, but supposed, and had no doubt, that Pickert with Wilson did go to consult Mr. John R. Thayer. Cleveland, the keeper, testified that R. F. Pickert came up from Providence the afternoon of the attachment, and, after a conference with Phillips, which the witness did not overhear, said they would take counsel of Mr. Thayer, and, having failed to find him in his office, in the evening asked the witness where Mr. Thayer lived, and went where directed, to see Mr. Thayer, in a hack with Wilson.

The defendant called Mr. Henry Bacon, of the firm of lawyers who made the writs on which the attachments were made, and who had charge of the making of the same, and offered his testimony to show that, on the evening of September 6, Mr. Thayer, who in these cases throughout has been, since they were brought, the sole counsel for these plaintiffs, came to his (Bacon's) office, and said to him that R. F. Pickert represented to him that a certain party in New York, entirely other than James A. Pickert, and not now claimed to be the owner of the property at all, was the owner of the attached property; that he had come to state the fact because Pickert wanted to have him (Bacon) write to his clients in New York this fact, and that, if they would go to see the owner in New York, they would be satisfied, and relinquish the attachment, which communication Mr. Bacon at once made by letter. The name of the alleged owner in New York was given to Mr. Bacon. To the admission of this testimony the plaintiffs objected, and the judge excluded the evidence.

The jury returned a verdict for the plaintiff in each case; and the defendant alleged exceptions.

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W. S. B. Hopkins, for the defendant.

J. R. Thayer, for the plaintiffs.

FIELD, J. It is contended that the evidence offered of what Mr. Thayer said to Mr. Bacon was competent for two purposes: first, to contradict R. F. Pickert, who had testified as a witness for the plaintiffs; and, secondly, as an admission made by Mr. Thayer as attorney for the plaintiffs in these actions, and therefore equivalent to an admission by the plaintiffs themselves.

As evidence to contradict the witness Pickert, it was not competent, because it was not testimony of anything R. F. Pickert said, but testimony of what Mr. Thayer said that he said. For the same reason, if the evidence was offered for the purpose of showing that R. F. Pickert, as general manager of the business, made certain statements which are to be regarded as made by him, while acting for his principals within the scope of his employment, and in legal effect the same as if made by his principals, the testimony was not competent to prove that R. F. Pickert ever made the statements. It is not necessary to determine whether evidence that Pickert made the statements to Mr. Thayer would be competent. On the defendant's theory, they were statements made by one agent of the plaintiffs to another, and it is at least doubtful if they were within the scope of the authority given to R. F. Pickert. It is only on the ground that there was evidence that Mr. Thayer, when he had the conversation with Mr. Bacon, was attorney for these plaintiffs, and adopted the alleged statements of Pickert to him as his own, that the argument of the defendant upon the competency of the admissions of an attorney at law against his client has any relevancy.

We think it very doubtful whether the evidence offered can be regarded as anything more than a statement by Mr. Thayer of what R. F. Pickert represented to him, and wished to have done; but if it be assumed that it contained any admission or representation by Mr. Thayer of the fact of ownership of the property, and if it also be assumed that there was evidence for the jury, that, at the time of the conversation with Mr. Bacon, Mr. Thayer had been retained as an attorney at law for these plaintiffs, for the purpose of obtaining a discharge of the attachment upon the property, still we think that the evidence was

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incompetent, because the statement was one which an attorney at law is not authorized, by virtue of his employment, to make on behalf of his client. The present suits had not then been brought. The information which Mr. Thayer said he had received from R. F. Pickert was given to Mr. Bacon that it might be sent to Mr. Bacon's clients in New York, to induce them to investigate the truth of the statement, and, if satisfied of its truth, to discharge the attachment. The attachment was never discharged. The admission was not made by Mr. Thayer for the purpose of dispensing with any rule of practice, or with the proof of any fact in the trial of the action already brought, or of the actions which might be brought, in reference to the attached property. It was a conversation relating to a fact in controversy, but not an agreement relating to the management and trial of a suit, or an admission intended to influence the procedure in the pending action, or in any other, if the attachment was not discharged. *Saunders* v. *McCarthy*, 8 Allen, 42. *Lewis* v. *Sumner*, 13 Met. 269. *Treadway* v. *Sioux City & St. Paul Railroad*, 40 Iowa, 526. *Petch* v. *Lyon*, 9 Q. B. 147. *Wagstaff* v. *Wilson*, 4 B. & Ad. 339. *Moulton* v. *Bowker*, 115 Mass. 36. *Parkins* v. *Hawkshaw*, 2 Stark. 239. *Young* v. *Wright*, 1 Camp. 139. *Watson* v. *King*, 3 C. B. 608. *Hulin* v. *Richards*, 2 C. & K. 216. 1 Greenl. Ev. § 186. *Exceptions overruled.*

COMMONWEALTH *vs.* GEORGE B. ELIOT.

Essex. November 1, 1887. — January 7, 1888.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Great Pond — Lease — Covenant — Town — Notice.

Under the Pub. Sts. c. 91, § 13, providing that, before making a lease of a great pond, the commissioners on inland fisheries "shall appoint a time and place for a hearing upon the application therefor, and shall give notice thereof to every city or town within whose limits any part of the pond lies," no notice is necessary where the whole of the pond lies in the city or town making the application.

If a lease of a great pond is made to a town, under the Pub. Sts. c. 91, containing covenants to be performed by the town, and a provision that, in case of breach

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of any of the covenants, the commissioners on inland fisheries may enter and expel the lessee, a breach of the covenants on the part of the lessee is not of itself evidence of an abandonment of the lease.

COMPLAINT, under the Pub. Sts. c. 91, § 27, alleging that the defendant, on December 23, 1885, at North Andover, "in a certain pond called the Great Pond, otherwise known as Lake Cochickewick, said pond being a body of water of more than twenty acres in area, and being wholly situated in said North Andover, the whole of said pond being then and there a place where useful fishes were then and there lawfully artificially cultivated and maintained, unlawfully did fish without the permission or consent of the inhabitants of the said North Andover, the said inhabitants being then and there the lessees and proprietors of said pond, and proprietors of all the fishes therein contained, under and by virtue of a lease of said pond, made to said inhabitants," by the Commonwealth.

Trial in the Superior Court, on appeal, before *Hammond*, J., who allowed a bill of exceptions, in substance as follows:

The government put in evidence a lease of said pond from the board of commissioners on inland fisheries to the inhabitants of North Andover, for the term of fifteen years from and including September 5, 1884, the date of the lease. The lease contained certain provisions, which are stated in the margin.*

* "And the said lessees hereby covenant with said Commonwealth, that they will pay said rent in manner aforesaid; that they will not occupy more than one tenth part of the premises aforesaid with the enclosure and appliances necessary for the taking and cultivation of fishes; that they will not avail themselves of the privilege of this lease to the prejudice of any rights of individuals, or public rights, other than the taking and cultivation aforesaid; that they will so arrange their enclosures and appliances aforesaid as not to debar ingress to and egress from said premises at proper places and at proper times; that they will not sell fishes for food at seasons when their capture is prohibited by law; that they will allow said board of commissioners at all times to enter on said premises, and to take fishes for purposes connected with fish culture and scientific observation; that during the last year of the period embraced by this lease they will not take nor capture any useful fishes, nor suffer the same to be taken or captured within the limits of said premises; that they will observe and obey all the laws of said Commonwealth relating to inland fisheries.

"Provided always, and these presents are upon this condition, that in case of the breach of any of the covenants to be observed on the part of the

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It appeared in evidence, from the records of the town clerk, that, on August 25, 1884, the inhabitants of said town, at a town meeting, and under an article in the warrant for said meeting, voted to lease said Great Pond for a term of years, and to instruct the selectmen to petition for said lease, and to do it without delay. There was no other record relating to said leasing of the pond, subsequent to this date, upon the records of the town clerk.

The government called one Frye as a witness, who was a selectman of said town in the year 1884. He testified that, as such selectman, and under said vote, he went to the chairman of the board of commissioners on inland fisheries, for the purpose of obtaining a lease from the Commonwealth to the inhabitants of North Andover of said Great Pond; that he had a paper with him, and had a conversation with one Brackett, who was then acting as commissioner on inland fisheries; that he received a notice from said Brackett, which he took with him, and made two copies, and posted the notices in three places in North Andover; that they were posted between three and five days of the date of the lease, which was the date of the hearing; that said notices had been lost, and that, generally, said notices stated that ap-

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lessees, or in case the estate hereby created shall be taken from the lessees or its representatives by process of law, proceedings in bankruptcy, insolvency, or otherwise, the said board of commissioners or their successors may while the default or neglect continues, or at any time after such taking by process of law, without any notice or demand, enter on said premises, and expel and remove, forcibly if necessary, the said lessees and those claiming under them, and their effects.

"And these presents are upon the further condition, that all fishes artificially cultivated and maintained by said lessees within the limits of said premises, and not removed by them at the expiration of the last year of the period embraced by this lease, shall become the absolute property of said Commonwealth, and that said lessees shall use all reasonable efforts to thoroughly stock the waters of said pond with one of the species of fish commonly known as trout, land-locked salmon, or bass, keeping accurate records for the inspection of said board, and shall make a return of their doings to the commissioners on the first of October of each year, of the number and species of fish which they may place in or remove from the waters of said pond. And upon the further condition that said lessees shall make such regulations concerning the use of such pond and fishing therein as may be required by said commissioners. All regulations concerning the same shall be submitted to said commissioners, and be subject to their approval."

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plication had been made by the inhabitants of North Andover for a lease of Great Pond, under the provisions of the Pub. Sts. c. 91, and that a hearing would be had at the State House in Boston upon the matter, on September 5, 1884; that nobody appeared in opposition to the lease; and that he then received said lease.

It appeared that, since said lease, the town had expended on account of it about $84, made up of a payment of $15, as the entire rental reserved by said lease, and certain sums for the obtaining and recording of said lease, car fare, &c., and certain sums for fees incurred in prosecutions instituted against persons fishing, since said lease, upon said pond. It appeared, upon cross-examination of said Frye, that, since said lease, the town had paid nothing for the stocking of said pond with either of the species of fish mentioned in said lease, nor for the purpose of artificially cultivating fish in said pond, nor for the erection of any appliances for so doing, and had done nothing, except as before stated, towards the artificial cultivation of fish of any species in said pond. Frye also testified that he did not know of any return being made in the year 1884 to the commissioners on inland fisheries, as provided in said lease. And the defendant introduced evidence from the report of the commissioners on inland fisheries, for the year ending December 31, 1886, that said town had made no such return up to that time.

This was all the evidence upon the matters embraced in the rulings asked for by the defendant, and in the rulings of the court. It did not appear whether the commissioners kept a record of their proceedings or not.

The defendant asked the judge to give several instructions to the jury, of which the following is the only one which need now be stated:

"4. In order to the validity of a lease of a great pond there must be an application by the lessees, a hearing upon that application, and notice of the hearing. And the hearing must be at a reasonable hour, and at a reasonable place, and there must be reasonable notice of the time and place for hearing."

The judge declined so to rule, and instructed the jury, "that, it being undisputed that the whole of said pond was within the limits of the town of North Andover, the notice of hearing

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provided by the Pub. Sts. c. 91, § 13, was not necessary, and no notice was required; that no actual setting apart or occupancy of said pond by the town, for the purposes of said lease, was necessary to be proved in the case; and that there was no evidence to be submitted to the jury upon the question whether the town had abandoned the lease."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

W. S. Knox, for the defendant.

H. C. Bliss, Assistant Attorney General, for the Commonwealth.

FIELD, J. The only exceptions argued are the exception to the refusal to give the fourth instruction requested, and the exception to the instruction "that there was no evidence to be submitted to the jury upon the question whether the town had abandoned the lease." The instruction of the court upon the fourth request was, "that, it being undisputed that the whole of said pond was within the limits of the town of North Andover, the notice of hearing provided by the Pub. Sts. c. 91, § 13, was not necessary, and no notice was required." The town of North Andover was the lessee. The Pub. Sts. c. 91, §§ 13, 14, are re-enactments of the St. of 1873, c. 195, and the St. of 1874, c. 135. Notice is required "to every city or town within whose limits any part of the pond lies," that the city or town may appear and be heard upon the application for a lease. But when a city or town within whose limits the whole of the pond lies makes the application for a lease, a notice to it would be unnecessary. The notice required is notice to a city or town in its corporate capacity, and notice to any person or any other body corporate is not required.

There was no evidence that the lease had been determined by the board of commissioners on inland fisheries for breach of any of the conditions contained in it, or that the estate created by the lease had been surrendered by the town, and this surrender accepted by the commissioners. The town was still in possession under the lease, and liable to pay the rent reserved, and to keep its covenants contained in the lease.

Exceptions overruled.

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ASA H. HERRING *vs.* CHARLES H. DOWNING.

Essex. November 2, 1887. — January 7, 1888.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Insolvent Debtor — Action — Assent — Contract — Evidence — Consideration.

If an assignee of an insolvent debtor has knowledge of the pendency of an action brought by the insolvent upon a contract executed before the insolvency, and does not interfere with the action, his assent to the bringing of the action may be inferred; and the action may be maintained.

The declaration in an action of contract, brought by A. against B., alleged that, in consideration that A. should work up certain stock of B., which had been owned by A., B. agreed that A. should have as his property whatever remained of the stock after paying a promissory note held by B., for the benefit of A.'s creditors, and a certain sum which A. owed B. There was evidence that A. gave B. a bill of parcels of certain stock, and B. executed a promissory note to A. for the amount, which he did not deliver to A., but retained for the benefit of A.'s creditors, this note being equal to forty per cent of A.'s indebtedness; that, at the time this was done, B. said to A. that he might manufacture the stock, and raise the forty per cent, and that, if there should be anything more after paying that and B.'s claim in full, it should belong to A.; and that A. paid the forty per cent, and B.'s claim in full. *Held*, that there was evidence to sustain the declaration; and that, on the evidence, the action could be maintained.

CONTRACT. Writ dated December 27, 1884. The declaration contained three counts. The first count was to recover the sum of $3167.17, as a balance found due the plaintiff on an accounting together. The second count was on an account annexed to recover the sum of $1316.31. The third count was as follows: "And the plaintiff says that it was agreed by and between the plaintiff and defendant, that, in consideration that the plaintiff and his son should work up certain stock of the defendant, which had been owned and used by the firm of A. H. Herring and Son, in the business of manufacturing shoes, the plaintiff should have as his property whatever remained of said stock after paying from the same a certain note for the amount of $2770.94, which the defendant held for the benefit of the creditors of said A. H. Herring and Son, and a certain claim amounting to $1840.55, which the firm of A. W. Downing and Company (of which the defendant was a member) held against said A. H. Herring and Son. And the plaintiff says, that, in pursuance of said agreement, said stock was worked up by the

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plaintiff and his son, and said note and claim was paid therefrom, and there remained of said stock, after said payments, property of the value of $1316.31, which the defendant retained and refused to deliver to the plaintiff, and deprived the plaintiff of."

Trial in the Superior Court, before *Hammond*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff introduced evidence tending to show the following facts: The firm of A. H. Herring and Son, which consisted of the plaintiff and his son Edwin A., failed in March, 1883. Their business was that of manufacturing boots and shoes, in Haverhill. Their liabilities at the time of their failure amounted to about $8000, and their assets, which consisted of stock in the various stages of manufacture, manufactured goods, and leather, machinery, and accounts, were worth to them, to use in their business, about $7000, but to sell at forced sale were of much less value. Among the creditors was the firm of Amos W. Downing and Company, leather dealers, who held a claim against them of about $1850. The defendant and his brother, Amos W. Downing, were members of this firm. A. H. Herring furnished the entire capital stock of A. H. Herring and Son, but it did not exceed in amount the sum of $500. He was on friendly terms with Amos W. Downing and Company, and was an old friend of Amos W. Downing.

Upon the failure of A. H. Herring and Son, a meeting of their creditors was called. The creditors present were disposed to deal easily with the debtors, and voted unanimously to settle for forty cents on a dollar. An attempt to settle on that basis proved unsuccessful, owing to the refusal of two or three creditors (one of whom resided out of the State) to accept it, and the plaintiff and his son continued, without interruption, to work the business along until June 11, 1883. At that date the amount of their liabilities and the value of their assets remained substantially the same as at the time of their failure; but, having no credit, and little money, they were unable to continue, and were liable at any time to suit and attachment.

On June 11, 1883, A. H. Herring and Son signed and delivered to the defendant a receipted bill of parcels of all the assets of A. H. Herring and Son, for the expressed amount of

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$2770.94, and the defendant on the same day signed a promissory note of that date for the sum of $2770.94, payable to the order of A. H. Herring and Son, in six months from date, without interest.

Both parties admitted that $2770.94 was all that the goods were fairly worth to sell; but there was testimony in the case, which, as before stated, tended to show that said goods were of much greater value to the plaintiff, to be used by him in business in connection with his customers.

The note and bill of sale were both taken by the defendant, and retained in his possession, and the testimony of both parties tended to show that the note was retained by the defendant, as the property of A. H. Herring and Son, for the benefit of their creditors.

The sum of $2770.94 was supposed by the parties to be forty per cent of A. H. Herring and Son's indebtedness. The plaintiff and his son, Edwin A., differed in their testimony of the conversation with the defendant at the time the bill of parcels and note were given, but it was upon this conversation and the other evidence in the case that the plaintiff based his right of action, admitting, as he did, that, if he was entitled to recover on one count, he could not recover on the other.

The plaintiff testified that the note and the bill of parcels were signed on or about June 11, and that, at that time, this conversation took place: "I told Downing that we would give him a bill of sale for forty per cent, the sum that the creditors voted to take, or were willing to take, and he to give a note for that amount. He said he would take the bill of sale, and give his note for that amount, and then said that we might go on as before, and continue to manufacture, and raise the amount of the indebtedness, the forty per cent, and that, if there should be anything over after paying that, it should be mine."

Edwin A. Herring, who was present at the interview testified to by his father, gave the following testimony: "On June 11, 1883, we took to Downing this bill of sale of the entire stock and business, amounting to some $2700 or $2800. Prior to that time, we wished to sell the property for the amount that the majority of the creditors, all the creditors that attended the meeting, had agreed to take, for the purpose of preserving that

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for them. We therefore went to Charles Downing, and asked if he would not buy it for that amount. He said he wished us to bring over a statement of the amount of property that was there, with its value, what it was fairly worth in the business. We did so. We made out an itemized account; we went through the stock at the time we made this second schedule for Downing, and made an estimate of what it was worth to the business. We took the schedule to him. He had the schedule before him on his desk when we had the interview, and was glancing over the items of it, and asked some questions for information about the schedule and about the values. I know one thing he said, referring to the items of tools and implements which were set down, I think, at about $1100, and said, 'I shall not want them. You may have them.' There may have been some remarks made about the schedule, and then he said, 'Why, there is enough here to pay off the note to the creditors and pay our claim in full, and then leave you four or five hundred dollars.' I said, 'Yes, and more.' He said, 'I will take it.' I do not know whether it was at that interview or not, but in connection with it he said to father, 'Now I want you to go to work and work this out. I shall expect you to get me the note, and want you to go right on and work out this amount to the best of your ability.'"

The plaintiff and his son further testified that, at the interview of June 11, nothing was said about wages, and that some few days after, upon inquiry of the defendant as to what they should do about their living expenses, were told by him to draw them out of the business.

The plaintiff testified that frequently thereafter the defendant told him that all there was in the business after paying the note belonged to the plaintiff, and that the defendant had no interest except to help him.

It further appeared in evidence, that the plaintiff continued the business from June 11, under the name of A. H. Herring, agent, in that name buying and selling goods, collecting and paying out money, and depositing money in the bank and drawing the same out.

The defendant, however, had given his credit to the business; and purchases, though made in the name of A. H. Herring, agent,

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were made on the defendant's credit. These purchases, however, were largely from Amos W. Downing and Company. Between June 11, 1883, and January 1, 1884, the plaintiff drew out of the business, for his living expenses, at irregular times, and in irregular amounts, $377.

The defendant testified that, after a conference with his brother, Amos W. Downing, he agreed to buy the assets of A. H. Herring and Son, for a sum equal to forty per cent of their indebtedness; that the plaintiff said that he would work for just simply a living out of it; that he asked the plaintiff, "How much will that living cost you?" and the plaintiff said that he could live for nine dollars a week, and would.

On September 13, 1883, A. H. Herring and Son filed their petition in insolvency, and were duly adjudicated insolvent debtors on October 16, 1883. At the first meeting of their creditors, Amos W. Downing was appointed assignee of their joint and separate estates. On May 6, 1884, they received their certificates of discharge. Upon the election of the assignee, the note was delivered to him.

The plaintiff never called the attention of his assignee to the claim made in this action, did not insert it in his schedule of assets, and never conversed about the subject with the assignee. At the time of the sale of the stock to the defendant, the creditors knew and approved of the transaction, but there was no evidence that they knew of the alleged contract which was the foundation of this action. Amos W. Downing lived in Haverhill, was a witness at the hearing of this case before an auditor, and was present at the trial in the Superior Court.

The plaintiff also testified that, shortly before January 1, 1884, the defendant proposed to the plaintiff that one Cram, who was related to the defendant's wife, should put some money into the business, and have an interest therein; that the plaintiff assented to the suggestion, and thereupon, on January 1, 1884, an account of stock was taken. The account of stock showed that there was sufficient in the business to pay the note for the benefit of the creditors, and leave $3740 in the business; but this account only showed $390 in money. Cram became a partner in the business, which was thereafter carried on by the plaintiff and Cram, under the name of Downing and Cram. The plaintiff

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testified that the defendant told him that the $3000, which was credited to the defendant as capital, belonged to the plaintiff, but that he (the plaintiff) could not appear in the business, because he had not obtained his discharge in insolvency. On the ledger of Downing and Cram, Downing was credited with $3000, and Cram was credited with $1500. The plaintiff was debited with the sums, irregular in time and amount, by him drawn out, amounting in all, between January 1, 1884, and July 22, 1884, to $477.46. Cram was debited in the same way with $385. No other personal account appeared in the ledger or books of Downing and Cram.

The plaintiff testified that the amount of $3000, which was left in said business on January 1, 1884, was arrived at by giving the defendant, at his request, a check for $290.20, and by setting aside $450 for the plaintiff to use for personal expenses. The defendant denied that there was anything said about setting aside any money for the plaintiff's use, nor did the defendant testify that there was at any time any arrangement as to the plaintiff's compensation, other than that which the defendant testified to as occurring on June 11, 1883.

Before July, 1884, the note was paid in full to the assignee, to whom it had been delivered. In July, 1884, the defendant, under circumstances which were in dispute, sold the assets to Cram, the value of the same at the time being sufficient to pay the claim of Amos W. Downing and Company in full, and leave a balance of $1316.31. This balance the defendant has retained.

The case went to the jury on the first and third counts only. The defendant asked the judge to rule that, upon this evidence, the action could not be maintained, because the right of action had vested in the assignee.

The judge refused so to rule, and instructed the jury that the action might be maintained with the assent of the assignee, and that it was competent for the jury to find such assent from the assignee's knowledge of the pendency of the suit, his non-interference with it, and his attendance at the hearing before the auditor, and at the trial in the Superior Court.

The defendant also asked the judge to rule that there was no evidence for the jury on the third count, and to direct them to

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return a verdict for the defendant on that count; and also asked for a general ruling, that, on the evidence, the action could not be maintained. The judge refused so to rule.

The case was submitted to the jury under instructions, which were not excepted to, except as hereinbefore stated, and they returned a verdict for the defendant on the first count, and for the plaintiff on the third count. The defendant alleged exceptions.

W. H. Moody, for the defendant.

B. B. Jones, for the plaintiff.

FIELD, J. The jury returned a verdict for the plaintiff upon the third count of the declaration only. The defendant asked rulings, which were refused, that, upon the evidence, the action could not be maintained, because the right of action had vested in the plaintiff's assignee in insolvency; that there was no evidence for the jury on the third count; and, generally, that, on the evidence, the action could not be maintained.

The date of the petition in insolvency of A. H. Herring and Son was September 13, 1883, and they were duly adjudicated insolvent debtors on October 16, 1883, and Amos W. Downing was appointed assignee. The alleged contract was made on or about June 11, 1883. Whether this contract was, at the time the assignment in insolvency took effect, such an executory contract for personal services that it did not pass to the assignee, need not be decided, because, if it was not, an action could be brought, in the name of the plaintiff, for a subsequent breach of it by the defendant, if the assignee assented, and there was abundant evidence that the assignee had assented to the plaintiff's maintaining the action in his own name. *Hallett* v. *Fowler*, 10 Allen, 36. *Gay* v. *Kingsley*, 11 Allen, 345. *Mayhew* v. *Pentecost*, 129 Mass. 332. *Squire* v. *Lincoln*, 137 Mass. 399. *Powers* v. *Raymond*, 137 Mass. 483.

There was evidence for the jury, that the parties entered into the agreement set out in the third count. The plaintiff testified that the defendant "said he would take the bill of sale, and give his note for that amount, and then said that we might go on as before, and continue to manufacture, and raise the amount of the indebtedness, the forty per cent; and that, if there should be anything over, after paying that, it should be mine." There

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was other evidence, that, in addition to the payment of the note given by the defendant, which was in amount forty per cent of the whole indebtedness of A. H. Herring and Son, it was agreed that the plaintiff should pay in full the claim of Amos H. Downing and Company against A. H. Herring and Son.

The whole consideration of this agreement, as proved, is not set out in the third count; but, as we construe the exceptions, this objection was not taken. If it had been, the defect could have been cured by an amendment. There was evidence of the promise or agreement declared on, and that this promise or agreement was founded upon a sufficient consideration, a part of which is properly described in the declaration.

Exceptions overruled.

CHARLES H. NORTH & another *vs.* CARRIE S. DEARBORN.

Middlesex. November 9, 1887. — January 7, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Mortgage — Sale on Execution.

If a mortgagor by one deed mortgages two parcels of land, and subsequently conveys his equity of redemption in each parcel to a different grantee, he so far severs his interest in the different parcels by these conveyances that it is no ground of objection that his interest in each parcel is levied upon and sold separately on an execution against him.

WRIT OF ENTRY to recover two parcels of land in Woburn. Plea, *nul disseisin*. Trial in the Superior Court, before *Thompson*, J., who allowed a bill of exceptions, which appears in the opinion.

L. R. Wentworth, for the demandants.

T. F. Maguire, for the tenant.

FIELD, J. It appears that the first parcel described in the writ was conveyed by one Thompson to Charles T. Dearborn, the husband of Carrie S. Dearborn, the tenant in this action, by deed recorded on April 7, 1884, and that the second parcel was conveyed by said Thompson to said Charles T. Dearborn by

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deed recorded on November 11, 1881. The wife and her husband mortgaged the second parcel (which in some manner had been conveyed to the wife) to the Woburn Five Cents Savings Bank, by deed recorded on December 18, 1884, and they mortgaged both parcels to said bank by deed recorded on April 30, 1885. When this last mortgage was given, the title to the equity in the second parcel remained in the wife, and the title to the equity in the first parcel remained in the husband.

These demandants brought suit against the husband on July 27, 1885, and attached his interest in all this real estate, making a special attachment of his interest in the first parcel, the record title to which then stood in the name of Benjamin F. Fish, and they obtained judgment in the suit, and execution issued, and was levied upon the equity of redemption in the first parcel, as it stood at the time of the attachment, and upon the equity of redemption in the second parcel, the record title to which still stood in the name of the wife; and the officer sold by public auction, under this levy, separately, the equity of redemption in the two parcels to the demandants, who paid the price bid for each, and received deeds of both, which were duly recorded. Thereupon they brought this action against the wife.

The objection of the tenant is, that, "it appearing that both parcels demanded were included in said mortgage, recorded April 30, 1885, the officer should have sold both parcels for one bid to one person, and for one sum; that, as they were sold separately, the sale was void." The court sustained this objection, and directed a verdict for the tenant.

The demandants' claim necessarily is, that the conveyance to the wife of the second parcel is void as to them, and that the equity in this parcel was liable to be taken on execution by the judgment creditors of her husband. A similar claim must be made as to the first parcel, although it does not appear that Fish has conveyed this to the wife, or what claim, if any, she makes to it, except that both parcels are demanded in the writ, and she has pleaded *nul disseisin* as to both.

When a mortgagor retains the equity of redemption in all the parcels of land included in an existing mortgage, or when by one conveyance he has conveyed this equity to another person, who remains the assignee of the whole interest of the mortgagor

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in all the parcels subject to the mortgage, this equity must be levied upon and sold as one single and entire *res*, and separate sales of the right to redeem each parcel are void. *Webster* v. *Foster*, 15 Gray, 31. *Cochran* v. *Goodell*, 131 Mass. 464. *Plimpton* v. *Goodell*, 143 Mass. 365, 367.

When, however, the mortgagor has conveyed his equity in some of the parcels, but retains it in others, all of which are included in one mortgage, the levy of an execution issued upon a judgment against him must be upon only his right to redeem the parcels of land of which he retains the equity, if his conveyances are recognized as valid by the judgment creditor. If the mortgagor has conveyed his equity in all the different parcels to different grantees, by several conveyances, some or all of which are, or are claimed to be, voidable by his creditors, the levy of an execution against him may be made by a sale separately of the equities in the different parcels which have been conveyed to the different grantees. The mortgagee is not injured by this, as the mortgage debt must be fully paid before he can be compelled to release any parcel from the mortgage. The mortgagor is not aggrieved, because he has severed his interest in the equity of the different parcels by his conveyances. The purchasers at the sale on execution must bring separate suits against the different persons who hold the record titles to recover possession, and it may happen that some of the titles will prove to be good, and some void, as against creditors of the grantor, and this may render separate sales desirable. *Mansfield* v. *Dyer*, 133 Mass. 374.

We need not decide whether, in the last case supposed, there must be separate sales, or consider what rule, if any, there should be of contribution toward the payment of the mortgage debt, or of exoneration therefrom between the purchasers of the equities in the different parcels.

In the present case, the second parcel was conveyed to the wife before the execution of either of the mortgages. The equity in the first parcel was conveyed to Fish, after the execution of the second mortgage. Both these conveyances must have come mediately or immediately from the husband. The tenant's plea put the demandants' title to each parcel in issue, and the demandants might recover one parcel, and not the other.

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We are of opinion that the husband had so far severed his interest in the parcels, that the equities could be levied upon, and sold separately, under an execution issued against him.

Exceptions sustained.

PARKER L. CONVERSE, administrator, *vs.* EDWARD F. JOHNSON, administrator.

Middlesex. November 9, 1887. — January 7, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Demand Note — Statute of Limitations — Administrator.

A promissory note for a certain sum, with interest payable annually, but which states no time of payment, is payable on demand.

A person who has a domicil and actual residence in another State, and who only comes into this Commonwealth for a short visit, is "absent from and resides out of the State," within the Gen. Sts. c. 155, § 9, (Pub. Sts. c. 197, § 11,) and the statute of limitations does not run in his favor.

If the payee of a promissory note dies before his right of action upon it is barred by the statute of limitations, and the administrator of his estate brings an action upon the note against the administrator of the estate of the maker, within two years after the grant of the defendant's letters of administration, the action may be maintained, under the Pub. Sts. c. 197, § 12, although not brought until more than two years after the grant to the plaintiff of his letters of administration.

CONTRACT, by the administrator of the estate of Marshall F. Barrett against the administrator with the will annexed of the estate of Mary F. Hart, upon the following promissory note:

"$600. Concord, N. H., December 10, 1867.

"Value received, I promise to pay to Marshall F. Barrett, or his order, the sum of six hundred dollars, with interest at the rate of five per cent, payable annually. Mary F. Hart."

Writ dated June 19, 1886. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on agreed facts, in substance as follows:

On the day the note was given, Mary F. Hart was in Concord, in the State of New Hampshire, where she resided, and she continued to reside in said Concord up to the time of her decease. She owned real estate in Woburn, in this county, when the note was given, and subsequently. After the note was given, she visited in said Woburn for a few days, and her presence there

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was known by Barrett, the plaintiff's intestate. She died testate on June 8, 1870, and by her will gave to her two daughters, Mary D. Hart and Sarah L. Barker, a life estate in the real estate situate in Woburn, and nominated them executrixes of her will. This will was duly proved and allowed in Merrimack county, New Hampshire, in September, 1870, but no letters testamentary or of administration were ever issued in that State. In December, 1870, a copy of the will was filed and recorded in this county as a foreign will, on petition of said executrixes, who also petitioned that letters testamentary be granted to them; but, by reason of their failure to file a bond, no letters testamentary were ever issued to them, or either of them, and the estate remained unadministered until April 14, 1885, when, Mary D. Hart having died, and Sarah L. Barker having declined to accept the trust, the defendant was duly appointed administrator with the will annexed of the estate of Mary F. Hart by the Probate Court for this county, and gave due notice of his appointment as required by law.

Marshall F. Barrett, who during his whole life was a resident of Woburn, died on April 5, 1883, and the plaintiff, Parker L. Converse, was appointed administrator of his estate by the Probate Court for this county on June 26, 1883; he accepted the trust, and is now administering the same.

The affidavit of notice of his appointment was filed on June 29, 1883, and the note in suit is described in his inventory of the estate filed in the Probate Court on August 22, 1883. On August 3, 1885, he for the first time demanded of the defendant payment of said note, which was refused.

Interest on the note in suit was paid annually by the maker during her life, and, after her death, by her daughters above named, the last payment being made on December 10, 1882. These payments were indorsed on the note by a friend of the payee, acting as his agent and at his request.

If, upon these facts, the plaintiff was entitled to recover, judgment was to be entered for him for the sum of $600, with interest at the rate of five per cent per annum from December 10, 1882; otherwise, judgment to be entered for the defendant.

J. W. Johnson, for the plaintiff.

E. F. Johnson, pro se.

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FIELD, J. The promissory note was dated December 10, 1867, and was in legal effect payable on demand. The construction we give to the Gen. Sts. c. 155, § 9, (Pub. Sts. c. 197, § 11,) is, that as Mary F. Hart had her domicil and actual residence in New Hampshire when she gave the note, and continued to have them there until her death, and only made short, occasional visits in this Commonwealth, our statute of limitations never began to run in her favor. Within the meaning of the statute, she never came into this Commonwealth, but was absent from and resided out of it during the whole time which elapsed between the date of the note and her death. *Rockwood* v. *Whiting*, 118 Mass. 337.

She died testate in New Hampshire, on June 3, 1870, and her will was duly proved there in September, 1870, but no letters testamentary or of administration were ever issued in that State. In December, 1870, a copy of the will was duly filed, allowed, and recorded in Middlesex County, in this Commonwealth, where she left property. This was done on the petition of the persons named as executrixes in the will, but as they failed to file a bond, no letters testamentary were granted to them; "and the estate remained unadministered until April 14, 1885," when the defendant was duly appointed administrator with the will annexed by the Probate Court of that county, and gave due notice of his appointment.

Marshall F. Barrett, the payee and holder of the note, died in this Commonwealth, on April 5, 1883, and the plaintiff was duly appointed administrator of his estate by said Probate Court, on June 26, 1883, and gave due notice of his appointment. He brought this suit on June 19, 1886.

The defendant as administrator could not have been sued within one year after he gave a bond as administrator, which we assume was on April 14, 1885, the date of his appointment. And a suit must be commenced against him within two years after he gave the bond. Pub. Sts. c. 136, §§ 1, 9. After Mary F. Hart died, there was no one anywhere who could be sued until the defendant was appointed administrator.

It has been decided that § 12 of the Pub. Sts. c. 197, (Gen. Sts. c. 155, § 10,) is to be construed distributively. *Hill* v. *Mixter*, 5 Allen, 27. The precise point decided in that case is, that an

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action brought by the executor of the estate of the holder of a note against the executor of the estate of the maker, more than two years after the defendant's appointment, although within two years after the plaintiff was appointed executor, cannot be maintained; and it is said that § 10 of the Gen. Sts. c. 155, does not extend the time for bringing the action beyond that limited by the Gen. Sts. c. 97, §§ 5–8.

If Barrett had lived, the statute of limitations would not have been a defence, if he had brought this suit at the time it was brought. The contention is, that it cannot be maintained by the administrator of his estate, because brought more than two years after the grant of letters of administration to him.

Section 12 of the Pub. Sts. c. 197, was intended to be a re-enactment of the Gen. Sts. c. 155, § 10, and it was enacted in the Public Statutes in the form reported by the Commissioners. The Commissioners made some unimportant verbal changes, and omitted the words, "and not afterwards if otherwise barred by the provisions of this chapter," found at the end of the section in the General Statutes. It cannot be held that this omission was intended to change the law. The Pub. Sts. c. 197, § 12, cannot well be construed to mean that in every case the executor or administrator of a deceased person, who was entitled to bring an action, must bring the action within two years after the grant of letters testamentary, or of administration. The section was not intended further to limit the bringing of actions, but to extend the time within which they could be brought when the person entitled to bring them died before the expiration of the time, or within thirty days after the expiration of the time limited by other provisions of the statutes. It was not intended by this section that the debtor should have a defence to which he was not otherwise entitled, or that an executor or administrator should not collect debts due the estate by suits brought more than two years after his appointment, when the debts were not barred by other provisions of the statutes. See *Corliss Steam Engine Co.* v. *Schumacher*, 109 Mass. 416.

Judgment affirmed.

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LOREN N. BLANCHARD *vs.* JOHN B. FITZPATRICK.

Suffolk. November 11, 1887. — January 7, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Replevin — Sale — Case stated.

In an action of replevin brought by A. against B., the facts agreed stated that A. let C. have the goods replevied at an agreed price, on credit, the length of which depended on the monthly sales of C., that is, on the first of each month, C. was to pay A. for all goods sold by C. during the preceding month, but was not to pay for any goods until sold; that no agreement was made for a return of the goods; and that, while the goods were in C.'s possession, they were attached by B., an officer, on a writ against C. *Held*, that the title to the goods passed to C. on their delivery to him; and that A. could not maintain the action.

REPLEVIN. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on agreed facts, in substance as follows:

Prior to November, 1884, Sumner Fickett was engaged in the retail grocery and provision business at Boston. Early in that month, he sold an undivided half of his stock in trade to Charles E. Harriman, and immediately formed a copartnership with said Harriman, under the firm name of Fickett and Harriman, for the purpose of carrying on the grocery and provision business previously conducted by himself. Fickett and Harriman entered upon the contemplated business, and continued it until December 8, 1885.

The defendant, who is a deputy of the sheriff of Suffolk, on December 8, 1885, attached the goods replevied, which then formed a part of the stock in trade of Fickett and Harriman, by virtue of a writ in favor of one Jacob Fullarton and against said Fickett and Harriman, issuing from the Municipal Court of the city of Boston, on said December 8. The defendant held the goods in question by virtue of said writ when replevied by the plaintiff.

The plaintiff, who is a wholesale dealer in pickles and grocers' sundries, let Fickett and Harriman have the goods in question at an agreed and fixed price, on a credit, the length of whose

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term depended upon the monthly sales of Fickett and Harriman; that is, on the first day of each month said firm was to pay the plaintiff the agreed and fixed price for all the goods sold by the firm during the preceding month, but was not to be required to pay for any of said goods until sold by the firm. No agreement was made for a return of any of the goods.

If, upon these facts, the plaintiff was entitled to a judgment, damages were to be assessed in the sum of one cent; otherwise, judgment for a return of the goods to be entered, with nominal damages for the defendant.

G. O. Burnham & S. D. Charles, for the plaintiff.

W. B. French, for the defendant.

FIELD, J. It is sufficient to say that it does not appear by the agreed facts that the plaintiff at the time he sued out his writ was entitled to the immediate possession of the goods replevied. The agreed statement is not as full and clear as might be desired, but it does not appear that any condition was attached to the delivery of the goods by the plaintiff to Fickett and Harriman, and the reasonable construction of the agreed statement is, that the goods were sold to Fickett and Harriman on credit, and were to be paid for by them in monthly payments, at an agreed price, when they were sold by them. On this construction an absolute title to the goods passed to Fickett and Harriman when the goods were delivered to them.

Judgment affirmed.

LYDIA A. PORTER *vs.* ANNIE B. WAKEFIELD & trustee.

Suffolk. November 15, 1887. — January 7, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Husband and Wife — Pledge — Divorce — Trustee Process.

Jewelry to the value of $600 was given by a husband to his wife, and was afterwards delivered by her to him, in pledge for money advanced by him to her. Subsequently he was divorced from her. In an action by a creditor against the woman, in which the former husband was summoned as trustee, the trustee admitted in his answer that the jewelry belonged to his former wife, and set up the pledge to himself. *Held*, that the pledge was invalid, and that the trustee was properly charged.

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TRUSTEE PROCESS. Writ dated February 24, 1887. Cyrus Wakefield, summoned as trustee, answered, that, at the time of the service of said process upon him, he had in his possession certain jewelry of the defendant, namely, one pair of ear-rings and one cross, of the value in all of $600; and that he held the same as security for the payment to him by the defendant of the sum of $1336.88, which sum the defendant owed him.

In response to interrogatories filed by the plaintiff, the trustee answered that he and the defendant were married in this Commonwealth on January 17, 1871; that they were divorced here, by proceedings begun on December 17, 1885, in which a decree *nisi* was entered on May 3, 1886, which was made absolute on November 10, 1886; that, while they were husband and wife, he advanced certain sums of money to her, and, at her request, paid certain of her bills; that the jewelry in question was bought by him between 1873 and 1880, and was given by him to his wife; and that in December, 1885, it was handed to him by his wife, when no one else was present. The trustee declined to state what was said to him by the defendant at that time.

The Superior Court ordered the trustee to be charged; and he appealed to this court.

L. S. Dabney, for the trustee.

E. M. Parker, for the plaintiff.

FIELD, J. We need not consider whether clause 1 of the Pub. Sts. c. 169, § 18, providing that "neither husband nor wife shall be allowed to testify as to private conversations with each other," applies to the answers of a trustee in trustee process, or whether, if it does, a trustee can rely upon an agreement made with his wife in the presence of no other person, when he cannot be asked on interrogatories, or be permitted to state, what the conversations were which resulted in the agreement.

Taking the answers of the trustee most favorably for him, they show that he "advanced" money to his wife, or paid out money for her, at her request, and that she delivered to him the jewelry, which, as he admits, was her separate property, to be held by him as security for the payment of the money, and that afterwards he obtained against her an absolute divorce from the bonds of matrimony.

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Our statutes do not authorize the transfer of property from the wife to the husband. Pub. Sts. c. 147, § 3. St. 1884, c. 132. Independently of statute, a husband might be a trustee of the separate property of his wife, but a pledge of a chattel by her to him as security for the payment of money which he had lent to her, or paid for her, does not constitute a trust. The statutes now authorize the gift of certain kinds of property, to a limited amount, by the husband to the wife, if not made in fraud of his creditors. Pub. Sts. c. 147, § 3. And, without the aid of the statutes, gifts by the husband to the wife, if the wife retains possession, have, after his death, been upheld, subject to the right of his creditors to have the property applied to the payment of their debts, if it is required for that purpose; and gifts by the wife to the husband would perhaps be upheld in like cases, subject to a similar right on the part of her creditors. *Marshall* v. *Jaquith*, 134 Mass. 138.

With these exceptions, our law regards transfers of property and contracts made directly between husband and wife as void, although property can be conveyed by one to the other through the intervention of a third person. *Motte* v. *Alger*, 15 Gray, 322. *Stetson* v. *O'Sullivan*, 8 Allen, 321. *Edgerly* v. *Whalan*, 106 Mass. 307. *Roby* v. *Phelon*, 118 Mass. 541. *Atlantic Bank* v. *Taverner*, 130 Mass. 487. *Fowle* v. *Torrey*, 135 Mass. 87. *Butler* v. *Ives*, 139 Mass. 202. *Kneil* v. *Egleston*, 140 Mass. 202. *Woodward* v. *Spurr*, 141 Mass. 283.

It appears by the answers of the trustee to interrogatories, that this jewelry was bought by him and given to his wife "between 1873 and 1880." It is not certain, therefore, whether it was given before or after the passage of the St. of 1879, c. 133. The trustee, however, in his answer and throughout his examination, does not contend that the jewelry is his property, but he expressly or impliedly admits that it is the property of the defendant, and he contends that he has a right to retain it as security for the payment of the money due from her to him.

If a contract of pledge was made between the husband and wife in this case, it was void as against her creditors. Whether the trustee process could have been maintained while the relation of husband and wife existed need not be decided. See *Robinson* v. *Trofitter*, 109 Mass. 478. This is no reason why it

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should not be maintained after this relation has been dissolved by a divorce. See *Dunham* v. *Dunham*, 128 Mass. 34. This was not property which came to the husband by reason of the marriage, and no decree of the court in the libel for divorce was necessary to vest the title in her. Pub. Sts. c. 146, § 24.

Judgment affirmed.

MICHAEL TOOMEY *vs.* ERASTUS W. SANBORN.

Suffolk. November 15, 1887. — January 7, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Negligence — Personal Injuries — Private Way — Dangerous Pitfall.

The husband of the owner of city premises, rear communication with which was had through a dimly lighted passageway, while personally supervising repairs on the premises, caused a plank to be removed from the passageway and left a hole beneath unguarded, into which an employee of the city who was wont to use the passageway in taking offal from the premises fell, and was injured. *Held*, that the husband was liable.

TORT for personal injuries.

The third count of the declaration was as follows: "The defendant carelessly and negligently removed the planking of a certain passageway, thereby uncovering an excavation and hole beneath, and neglected to properly guard the same, and warn and notify those using said passageway of the removal of said plank, and the existence of said opening, excavation, and hole; and said passageway was thereby rendered unsafe to those using the same. The plaintiff was rightfully using said passageway, and was in the exercise of due care, and in consequence of the aforesaid condition of said passageway, and the aforesaid negligence of the defendant, he fell into said opening, excavation, and hole, and was seriously hurt."

The answer was a general denial.

Trial in the Superior Court before *Mason*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff called several witnesses, who testified, in substance, that the passageway in question was about four feet

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wide, and some thirty or forty feet in length, with a plank walk or floor; that it opened out of Cambridge Street in Boston, and communicated by means of doors through its walls or sides with back entrances to houses numbered 1, 3, 5, and 7, on Hancock Street; that it was covered by building No. 1, and received light from the door opening on Cambridge Street, which was usually kept open during the day, and from a window over the door at the opposite end. The defendant, who was called by the plaintiff, testified that the door on Cambridge Street was the full width of the passageway, with the exception of the necessary casings on either side; that the door was eight or nine feet high; that above the door was a window extending across the door, and about two feet high; and that at the time of the accident a portion of the partition fence in the rear of No. 5 was down, and light came in through that opening.

The flooring of the passageway for some six or eight feet from the street entrance was on the street level; but from that point it was higher, there being a rise of five steps, and it was upon this raised or higher part of the passageway that the accident occurred. The entrance to No. 5 was on the left of the passageway entering from Cambridge Street, and to No. 1 on the right nearly opposite the entrance to No. 5; both opening from the higher part of the passageway. The accident occurred on Tuesday, October 20, 1885, at about half past nine in the morning.

The plaintiff put in evidence to show that there were no basement entrances to any of the above-named houses on Hancock Street, and that no other rear entrances for the removal of offal existed, save those opening on the passageway. It further appeared, that, some time prior to October 20, certain repairs were being made on house No. 5, either on the rear extension or on the shed connected with it; that the house belonged to the wife of the defendant; that the repairs were being done under the personal direction and supervision of the defendant; that the material used for making these repairs was brought in through this passageway; that, on the morning of October 20, two workmen employed by the defendant, by the direction and under the personal supervision of the defendant, removed a plank of the floor on the left-hand side of the passageway, for the purpose of seeing if there were some brick beneath

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which they desired to use (the plank taken up being about six feet long, and from one and a half to two feet wide); that in order to ascertain this, a small lamp was obtained, and one of the workmen and the defendant went down into the excavation beneath the floor, which was between two and three feet deep; that, after they had examined and found no brick there, the workmen went back to their work in the yard, and the defendant took the lamp into the house, leaving no one in the passageway; and that in a "little while" — "don't know how long" — afterwards, in the language of the only witness who testified as to the time, one of the workmen heard a noise in the passageway, immediately went into it, and found that the plaintiff had fallen into the excavation. This was about half past nine in the morning, the day being bright and sunlit. The precise time between the removal of the plank and the time when the plaintiff fell into the excavation was not given, one of the plaintiff's witnesses putting it at from one half to three quarters of an hour, and two others at about twenty minutes, the defendant saying he should think it was ten or fifteen minutes.

The defendant testified that when he left the passageway the plank had been placed on its edge, resting at one end against the wall on the left, adjacent to the opening, so as to form a guard to those coming into the passageway from Cambridge Street. The two workmen did not remember where it was placed, and the plaintiff testified that no plank stood on its edge, and no plank at all was on that side of the passageway; that he saw the plank when it was put back in its place by the defendant, a short time after he was hurt, and that it was taken from the pile of lumber on the other side of the passageway. One Hardy testified that there was no plank near the hole, and no plank at all on that side of the passageway. Some of the plaintiff's witnesses testified that there was on the right side of the passageway a pile of lumber; others testified that they saw none, and did not think there was any. The defendant testified that there was no lumber in the passageway over which he had any control; that he did not think there was any lumber in the passageway; and that he was certain that there was none opposite or near the hole. It appeared by the evidence that the

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space between the opening and the right-hand wall of the passageway was from two to two and a half feet.

The plaintiff testified that he was employed in the health department of the city of Boston, in the removal of offal, and acted under the direction of the superintendent of health; that on the 20th of October he was assisting the driver of the offal cart; that on the said 20th of October, and in his regular round of duty, he went to the passageway in question; that as he went up, with the purpose of entering the entrance of No. 1 to remove the offal. he fell into the opening occasioned by the removal of the plank; that he had been in the habit of going to these houses on Hancock Street to collect offal, and of using this passageway, for some thirteen years; that he usually went there on Tuesdays, Thursdays, and Saturdays of each week, generally at from 9.20 to 9.30 in the morning, but sometimes went in the afternoon; that his hours of work were from a quarter before seven in the morning until six in the afternoon; and that he went into the passageway as usual, saw the pile of lumber on the right, and as he was passing it stepped into the hole on the left, which he did not see, it was so dark. He said, "I had to keep to the left of the lumber." He was intending to enter No. 1 first; said he did not see the hole before he stepped into it, and that there was nothing there which led him to think a plank was up; that there was nobody in the passageway; that there was no light there, and nothing there except this pile of lumber; and that he was walking the same as he usually did. He said, "I walked into it just as anybody would; I thought the place was as solid as any place." He said that he had never known of any of the floor of the passageway being taken up except once, about nine years before.

The plaintiff also testified that, during the thirteen years that he had been in the habit of going to this place, he had seen other people use this passageway, — grocery-men, icemen, provision-men, milkmen, every kind that would want to go there on business.

John Hardy testified that he was the driver of the offal cart on the day in question; that the plaintiff entered the passageway to get the offal from No. 1, a little ahead of the witness; and that when he got nearly opposite No. 5 he fell into the

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hole; that he had been on this route a year and a half, using this passageway; that Toomey walked into the passageway "as usual, same as he always did"; that there was no light there, and that there was no barrier or warning of any kind.

The plaintiff offered two ordinances of the city of Boston, one relating to house offal, and another relating to the superintendent of health, for the purpose of showing that the removal of house dirt, ashes, and offal is within the power and duty of the superintendent of health; and that all house offal shall be kept in easily accessible places, and taken away as often as twice each week by the men in the employ of the superintendent of health.

The defendant, having been called as a witness by the plaintiff, testified that he did not own house No. 5 on Hancock Street; that he had once owned it, but about twenty years ago conveyed it to his daughter; that some fifteen years ago his daughter conveyed it to his wife, who had owned it ever since; that in 1885, and for some years prior thereto, she rented it to a tenant, and that he, his wife, daughter, and son boarded in the house with the tenant; and that he had lived or boarded in the house continuously for some twenty years.

All the plaintiff's witnesses excepting the defendant testified that the passageway was quite dark, one testifying that it was so dark that you could not distinguish a person's features until close to him, the plaintiff testifying that it was very dark, and the defendant testifying that it was light enough to read a newspaper, as he had satisfied himself a day or two before the trial. A witness called by the defendant testified, "I think it was plenty light enough for one to see well enough."

The defendant asked the judge to instruct the jury that on the whole evidence the plaintiff was not entitled to recover under the third count. The judge declined so to instruct; the jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

E. Avery, for the defendant.

H. E. Swasey, for the plaintiff.

FIELD, J. The single exception argued by the defendant is to the refusal of the court to rule "that on the whole evidence the plaintiff was not entitled to recover under the third count." It appears that estate No. 5 was owned by the wife of the

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defendant, but had been let to a tenant who occupied it; that the defendant and his wife boarded and lived with the tenant in the house on the estate; that the defendant was personally supervising repairs which were being made upon the house, and had directed that a plank be removed from the floor of the passageway; and that this had caused a dangerous hole to be opened in the floor, which was left unguarded and into which the plaintiff fell. There was evidence that the passageway had been constructed and was maintained for the purpose, among other things, of affording a back entrance to the house, and was, as the defendant knew, constantly used by the servants of the city of Boston for the purpose of removing the ashes and offal from the house, and that the plaintiff, as such servant, was rightfully using the passageway on the implied invitation of both the owner and occupant of the house for this purpose and was in the exercise of due care.

The case taken most favorably for the defendant is, that he caused to be opened in a private way a dangerous pitfall, into which the plaintiff, while rightfully using the way with due care, fell. The ruling was right. *Exceptions overruled.*

DANIEL T. HAGAN *vs.* JOHN K. SARTWELL.

Suffolk. November 18, 1887. — January 7, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Written Agreement — Extrinsic Evidence — Fraud.

A creditor, who had executed an assignment and release of his claim, signed a receipt containing an agreement "to pay all my costs" in an action pending on the claim. The debtor refused to pay the costs in that action, and was defaulted. On a review, the creditor offered extrinsic evidence of an agreement by the debtor to pay the costs. *Held*, that, as the assignment and release would have been a defence to the original action, or ground for dismissing it, the evidence was immaterial.

WRIT OF REVIEW. Trial in the Superior Court, before *Aldrich*, J., who allowed a bill of exceptions the substance of which appears in the opinion.

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P. J. Doherty, for the defendant in review.

J. L. Eldridge, for the plaintiff in review.

FIELD, J. On February 3, 1883, Sartwell with other creditors of Hagan signed an agreement under seal, whereby he agreed to accept, in discharge of his claim against Hagan, twenty-five per cent thereof, to be paid within twenty days from date, "provided also that in addition to said twenty-five per cent all costs shall be paid." When this agreement was signed by Sartwell, he had brought an action at law against Hagan on his claim, in which Hagan's goods had been attached, but the writ had not then been entered. Hagan, through Everett, his attorney, paid his creditors, including Sartwell, the twenty-five per cent within the time agreed upon, and Sartwell with the other creditors signed and delivered to Everett papers under seal, the first purporting to assign to Everett all claims against Hagan, and the second purporting to release to Everett all claims against Hagan. At the same time that Sartwell signed these papers he also signed a receipt for twenty dollars received from Everett, and containing an agreement "to pay all my costs" in the action pending against Hagan. Hagan subsequently refused to pay the sheriff's fees in the suit, and Sartwell entered the writ on the return day in April, 1883, and, the defendant having been defaulted, obtained judgment against Hagan, whereupon Hagan brought this writ of review.

Sartwell offered to show that before he signed the receipt "there was an oral agreement between him and said Everett that Hagan was to pay all the costs in said Sartwell's suit against him, and also twenty dollars for the fee of said Sartwell's attorney; that he, said Sartwell, did not read the receipt before signing it; that said Everett when he paid said twenty dollars said he wanted a receipt for it as a voucher, and thereupon drew up the receipt, which he handed to Sartwell to sign"; and that Sartwell signed it and delivered it to Everett. Sartwell also testified that he did not read the receipt, having confidence in Everett, and supposing that "it contained nothing but a receipt for the twenty dollars paid him to cover the amount of his attorney's fee."

Sartwell's contention was, that, although he could have read the paper if he had chosen to read it, and although Everett did

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nothing to mislead him except to present the paper for signature, yet under the circumstances stated he was in fact deceived and misled by Everett, and that his signature was obtained by fraud.

The court ruled that the evidence of Sartwell as recited above "was inadmissible to vary the terms of the written agreement contained in the receipt, and that the evidence offered would not authorize the jury to find that the signature of the defendant in review to that agreement was obtained by fraud on the part of the plaintiff in review," and to this Sartwell excepted.

We are unable to see that the question presented is material. There is nothing in the exceptions to indicate that the delivery of the assignment and release was conditional upon or influenced by the form of the receipt, and the assignment and release would have been a defence to the action of Sartwell against Hagan, or a sufficient ground for dismissing it if Sartwell prosecuted it without Everett's consent. If the receipt were reformed so as to read as Sartwell contends it should read, the legal effect of the assignment and release would remain. Sartwell according to his own statement delivered the assignment and release to the attorney of Hagan, for Hagan's benefit, without insisting upon the payment of the costs. He trusted to Hagan's paying the costs in the future. As the receipt does not discharge or relate to the claim or cause of action of Sartwell, but only to the costs of suit, it could not be pleaded in bar of the action, or used to defeat the action. If Sartwell should bring an action on the promise of Hagan to pay the costs, the validity of the receipt would be material, provided that, notwithstanding the delivery of the assignment and release, an action could be maintained on this promise; but the validity of the receipt is not material in the present suit, when it appears that Sartwell has executed and delivered the assignment and release, concerning which no fraud or misunderstanding is claimed.

Exceptions overruled.

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COMMONWEALTH *vs.* EDWIN WENTWORTH.

Norfolk. November 21, 1887. — January 7, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Liquor Nuisance — Lease — Landlord's Control — Indictment — Variance.

An indictment on the Pub. Sts. c. 101, § 9, alleging "control" by a landlord over a liquor nuisance, is negatived by proof that the tenant is in possession under a lease.

INDICTMENT under the Pub. Sts. c. 101, § 9, alleging that the defendant, from June 1, 1886, to February 4, 1887, "had under his control a certain building, ... and did then and there, while said building was so under his control, unlawfully and knowingly permit a certain tenement in said building to be used by one Edward H. Galligan of said Canton for the illegal sale and illegal keeping for sale of intoxicating liquors," and that said Galligan kept and maintained a nuisance "with the knowledge and permission of the said Edwin Wentworth, then and there having control of said building as aforesaid."

Trial in the Superior Court, before *Pitman*, J., who allowed a bill of exceptions, the material parts of which are as follows:

It was admitted that the defendant was the owner during the time alleged of the building described in the indictment, and that no person was licensed during that time to sell or keep for sale intoxicating liquors in any part of the building. There was evidence that Galligan was the lessee of the defendant of part of the building, by virtue of a lease which covered the time alleged in the indictment; that liquors kept for sale had been seized on the leased premises during the same time; that the defendant was present at a trial in July, 1886, before a trial justice, at which counsel for Galligan stated "that he would admit that the liquors seized were kept for sale, but by whom was the question"; that the defendant had said that he could not be convicted if Galligan did make illegal sales, as he had no notice; that the defendant was asked, on one occasion, if he would pretend that the building in question was not used for the purpose of a grog-shop, and he replied that he would not

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say; that the defendant had recommended in writing that an application by Galligan for a license be granted; and that the defendant, in reply to the question, "Did you believe liquors were sold" on the leased premises? answered, "I presume it was so."

The defendant asked the judge to instruct the jury that the government had failed to prove by sufficient evidence that the defendant during the time alleged, or any part thereof, had the actual control, or any such control as is required to constitute the offence charged, and that if the premises described were leased to Edward H. Galligan during the time alleged, and said Galligan was in occupation of the same under said lease, the defendant could not be convicted. The judge refused so to rule, but ruled that said tenement was under the control of the defendant by virtue of the provisions of the Pub. Sts. c. 101, § 8, and that a man may be said to permit what he has the right and power to prevent, but which right and power he does not choose to exercise. The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. L. Eldridge, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

FIELD, J. If a building is let to a tenant who enters into possession under a lease, the building is not under the control of the landlord, but is under the control of the tenant while he continues in possession under the lease, unless there are special provisions in the lease which give the control to the landlord. By the Pub. Sts. c. 101, § 8, the landlord can recover possession by entry or by action if the tenant uses the building for the illegal purposes described in the Pub. Sts. c. 101, § 6; but unless there are special provisions in the lease, the landlord cannot in any other manner prevent the tenant from using the building for these illegal purposes.

The Pub. Sts. c. 101, § 9, provide for the punishment of three different acts. If a person who owns a building, or has control of it, knowingly lets it for the illegal purposes specified, or if while having the building under his control he knowingly permits it to be used for these illegal purposes, or if after due notice that the building is used for these illegal purposes he omits to take all reasonable measures to eject the occupant, he

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"shall be deemed guilty of aiding in the maintenance of such nuisance."

If the statute had been less carefully drawn, there would be some force in the contention that a person may be said to permit what he does not prevent, if he has lawfully the power to prevent it, and it is made by law his duty to prevent it. But the last clause of the section was, we think, intended to define the whole duty of a landlord who, having let his building not knowingly for any of these illegal purposes, has due notice that the tenant, after he has taken possession and control, is using the building for these purposes. See Pub. Sts. c. 100, § 20.

The evidence recited in the exceptions tended to prove an offence under the last clause of the section, if it tended to prove any offence, while the indictment is under the second clause of the section. There was no evidence that the defendant actually had the control of the building described in the indictment. So far as appears, he had not the control, but he could have taken control by ejecting his tenant, if the tenant was using the building for the illegal sale of intoxicating liquors. The principal exception must be sustained, and it is unnecessary to consider the others. *Exceptions sustained.*

COMMONWEALTH *vs.* BENJAMIN F. HOLT.

Suffolk. November 21, 1887. — January 7, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Milk — Sale — Special Contract — Evidence — Analysis.

On a complaint for the sale of milk not of good standard quality, evidence that the milk was delivered under a special contract is immaterial.

If a buyer of milk takes a portion to a milk inspector, the latter may testify on the trial of such a complaint as to the results of his analysis.

COMPLAINT alleging that the defendant, on April 23, 1887, "did sell to Robert Rooney one pint of milk not of good standard quality; that is to say, milk containing less than thirteen per cent of milk solids."

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Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions in substance as follows:

The defendant made a special contract with the wife of Rooney, by which he was to deliver to her each day one quart of the milk of one dairy, and fulfilled his part of the contract. On April 23, 1887, after the milk had been delivered, Rooney, without any notice of his intention to the defendant or his agent, carried the milk to the milk inspector, who caused a sample of the same to be analyzed, and then brought this complaint, which he signed and prosecuted in the usual way.

Subsequently, the defendant called upon the milk inspector and requested a portion of the milk in question; but the remainder of the milk had not been preserved, nor had the inspector reserved or sealed a portion of the same before making the analysis. It appeared from the evidence that the milk contained less than thirteen per cent of milk solids, and was not of good standard quality.

The defendant asked the judge to rule, — 1. that, as this was a special contract for the milk of one dairy, it was immaterial what the quality of the milk might be, and, if delivered by the defendant as he received it from the dairy, he would not be guilty; 2. that, as the defendant and his agent were deprived of the opportunity of requesting a portion of the sample of milk at the time it was taken, no request was necessary, and the results of the analysis were not admissible in evidence; 3. that, under the circumstances, the defendant's subsequent request was sufficient, and the analysis was inadmissible; 4. that the analysis was inadmissible, because the St. of 1884, c. 310, § 4, had not been complied with.

The judge refused so to rule, the jury returned a verdict of guilty, and the defendant alleged exceptions.

J. A. McGeough, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

FIELD, J. The St. of 1886, c. 318, § 2, prohibits, under a penalty, the sale of milk which is not of good standard quality, and the alleged contract was immaterial. Indeed, the contract would be held to mean that the milk delivered should be such as could lawfully be bought and sold. The testimony of the milk inspector to the results of the analysis was properly received in

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evidence. The milk was delivered to the inspector for analysis by the purchaser of the milk, and was not taken from the possession of the defendant, pursuant to the St. of 1886, c. 318, § 1.

In cases where the milk analyzed has not been taken under the provisions of the statute, the competency of evidence is to be determined by the common law, and the testimony of any person who had sufficient skill to analyze milk, and who had analyzed some of the milk which was shown to have been sold by the defendant, was admissible. *Commonwealth* v. *Spear*, 143 Mass. 172. *Exceptions overruled.*

CATHERINE KAVANAUGH *vs.* MORRIS KAVANAUGH.

Hampden. September 27, 1887. — January 9, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & KNOWLTON, JJ.

Probate Court — Separate Support — Guardian — Spendthrift.

Under the Pub. Sts. c. 147, § 33, on a petition for separate support brought by a wife against a spendthrift husband under guardianship, the Probate Court cannot make a decree against the guardian.

PETITION to the Probate Court under the Pub. Sts. c. 147, § 33, by Catherine Kavanaugh, alleging that she was the lawful wife of Morris Kavanaugh; that her husband failed, without just cause, to furnish suitable support for her; that the petitioner, for justifiable cause, was actually living apart from her said husband; and praying that the court would prohibit the husband from imposing any restraint on her personal liberty, and would make an order for her support. The following indorsement was upon the petition: "I, Jas. H. Loomis, guardian of said Morris Kavanaugh, hereby waive further notice, and request that a hearing and decree be had forthwith. James H. Loomis."

On this petition the judge of probate made a decree that, "due notice of said petition having been given to the said Morris Kavanaugh, and to James H. Loomis, his guardian, ... said husband be, and hereby is, prohibited from imposing any restraint

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on the personal liberty of said petitioner; and that said guardian pay to her for her support, from income of estate of said Morris, the sum of three dollars per week, provided one third of the net income of the property of said ward, in the hands and control of said guardian, shall amount to as much as that sum; but if it shall amount to less than that sum, then said guardian shall pay to the petitioner such proportion of three dollars per week as one third of said net income shall amount to."

From this decree the respondent appealed, and filed the following reasons of appeal, as amended:

"1. That the court had no authority to decree a payment or payments of money by the respondent, he being at the time of the institution of these proceedings, and at the time of said decree, unable to pay said money, or to comply with said decree, by reason of being under guardianship as a spendthrift by former decree of said Probate Court.

"2. That the guardian was not made a party to the proceedings.

"3. That the court had no authority to decree a payment of money by the respondent to the petitioner, he being by order and decree of this court unable to pay.

"4. That the court had no authority to make a decree ordering the guardian to pay money as decreed.

"5. That the court had no authority to order a conditional or fluctuating decree.

"6. That the court did order a conditional or fluctuating and uncertain and indefinite decree.

"7. That the court only has authority to make a definite decree in this case, if any, for a fixed time of payment."

It was agreed by the parties, that, when the petition was brought, the respondent was under guardianship as a spendthrift by a former decree of the Probate Court for the same county, and so continued; that the guardian, James H. Loomis, was not made a party to the proceedings; and that Loomis made the indorsement on the petition before the decree.

Hearing before *Holmes*, J., who reserved the case for the consideration of the full court.

E. H. Lathrop, for the respondent.

W. W. McClench, for the petitioner.

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FIELD, J. The jurisdiction of probate courts to entertain petitions brought under the Pub. Sts. c. 147, § 33, is distinct from their jurisdiction over the appointment of guardians for spendthrifts. Pub. Sts. c. 139, §§ 1, 8; Sts. 1874, c. 205; 1880, c. 64; 1887, c. 332, § 3. It happens that the proceedings in this case, and in that for the appointment of the guardian, were had before the Probate Court of the same county, because the residence of the respondent continued to be in the same county; Pub. Sts. c. 147, § 34; c. 139, § 1; but they are independent proceedings.

The guardian properly appeared for and represented his ward in this petition, but the guardian was not a party to it, and no decree could be made against him. Pub. Sts. c. 139, § 29. *Hicks* v. *Chapman*, 10 Allen, 463. *Rollins* v. *Marsh*, 128 Mass. 116.

The decree cannot be considered as an attempt by the Probate Court to compel the guardian to apply "the income and profits" of the ward's estate, "so far as may be necessary, to the comfortable and suitable maintenance and support of the ward and his family," under the Pub. Sts. c. 139, §§ 30, 38.

Other objections have been taken to this decree, the most important of which are that the decree is conditional and indefinite, and that no decree for the payment of money could be made against a person under guardianship as a spendthrift, because by the guardianship he is divested of all control over his property. There are manifest reasons why, if a decree for the payment of money be made against the ward, it should not be enforced by an attachment of his person. *Blake's case*, 106 Mass. 501.

Whether in a proceeding like this a decree for definite sums of money to be paid in the future can be rendered against the ward, which may be enforced by an execution to be levied upon his property, or which the guardian can be compelled to satisfy, if he has sufficient estate in his hands, by an action on his bond, — or whether the amount of the ward's property which should be devoted to the support of the wife must be determined by the Probate Court under any jurisdiction it may have to control the guardian in the management and disposition of the ward's estate and the income and profits thereof, — are questions of some

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difficulty, which need not now be decided. That part of the decree of the Probate Court which requires the guardian to pay money to the petitioner must be reversed, and that part of the decree which prohibits the husband from imposing any restraint on the personal liberty of the wife until the further order of the court, must be affirmed. *Ordered accordingly.*

CHARLOTTE A. CLARK *vs.* INHABITANTS OF EASTON.

Bristol. October 26, 1887. — January 9, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Public Officer — De Facto and De Jure — Road Commissioners.

Road commissioners are public officers for whose acts a town is not responsible.

A town, not having accepted the St. of 1871, c. 158, or the Pub. Sts. c. 27, §§ 74–77, elected "road commissioners," who, while performing the duties of that office, committed a trespass. *Held*, in an action against the town therefor, that they were road commissioners *de facto*, the validity of whose election could not be collaterally impeached.

TORT for trespass in repairing a town way in the defendant town. Trial in the Superior Court, before *Barker*, J., who ruled that on the facts the action could not be maintained, and directed a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

L. C. Southard, (*D. F. Buckley* with him,) for the plaintiff.

H. J. Fuller, for the defendant.

MORTON, C. J. This is an action of tort for a trespass upon the plaintiff's land. The trespass consisted in entering upon the land and depositing thereon stone, earth, and rubbish, thereby obstructing a watercourse. The acts of trespass were committed by three persons acting as road commissioners in repairing a town way.

It is too well settled to need extended discussion, that officers like surveyors of highways and road commissioners, although they are elected and paid by the town, are public officers, and not agents or servants of the town, and that the town is not

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responsible for their acts in the performance of their public duties. *Elliott* v. *Willis*, 1 Allen, 461. *Barney* v. *Lowell*, 98 Mass. 570. *Sudbury* v. *Heard*, 103 Mass. 543. *Haskell* v. *New Bedford*, 108 Mass. 208. *Cushing* v. *Bedford*, 125 Mass. 526. *McCarthy* v. *Boston*, 135 Mass. 197.

A majority of the court is of the opinion that this principle applies in the case at bar, because the persons who committed the trespass were acting as public officers, and were road commissioners *de facto*, not *de jure*.

At the annual meeting in March, 1883, the town elected three persons as road commissioners, being the same persons who committed the acts of trespass complained of.

In the year 1879 the town voted "to choose three road commissioners for the ensuing year to superintend the repairs of highways and town ways," and also voted "that all roads authorized or ordered to be built shall be built under the direction of the road commissioners." In that year, and in every year up to and including the year 1883, the town elected three road commissioners with the same powers and duties. It appeared in the trial of the case at bar that the town had never voted to accept the provisions of the St. of 1871, c. 158, or of the Pub. Sts. c. 27, §§ 74–77, relating to road commissioners.

Perhaps it might be held, in a proceeding directly against the persons chosen to test their title to office, that, by reason of the irregularities in the action of the town, they were not legally elected as road commissioners, with all the powers and duties appertaining to that office. But it is a serious question whether, so far as the duties of repairing highways and town ways are concerned, road commissioners thus elected would not be regarded as highway surveyors. The law requires that a town shall at the annual meeting elect "one or more surveyors of highways." Pub. Sts. c. 27, § 78.

Suppose a town should elect one person as road superintendent to repair the highways, there would be strong grounds for holding that such person was a surveyor of highways, though called by a different name.

But however this may be, we think that for the purposes of this case the persons elected by the town must be treated as road commissioners *de facto*, and that the plaintiff cannot in this

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suit collaterally inquire into the validity and regularity of their election. They were elected by the town as road commissioners, and accepted, were qualified, and publicly acted as such. They were thus in the position of persons who were holding and publicly exercising the functions of an office known to our laws, by virtue of an election by the town which was *prima facie* valid.

In *Fitchburg Railroad* v. *Grand Junction Railroad*, 1 Allen, 552, it is said in the opinion, that the definition of an officer *de facto* is "one who comes in by the forms of law, and acts under a commission or election apparently valid, but, in consequence of some illegality, incapacity or want of qualification, is incapable of lawfully holding the office." The case at bar falls within this definition. But in a later case it was held that this definition was too narrow, and that a man who had been a constable and continued to perform the functions of the office after his commission had expired, publicly holding himself out as a constable, was an officer *de facto*, whose acts in serving process could not be collaterally called in question, the court adopting in substance the broader definition of an officer *de facto* given by Lord Ellenborough in *The King* v. *Bedford Level*, 6 East, 356, 368, as being "one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." *Petersilea* v. *Stone*, 119 Mass. 465.

It is urged by the plaintiff, that the doctrine as to officers *de facto* cannot apply in this case, because there is no such office as that of road commissioner in Easton. The argument is, that there cannot be an officer *de facto* unless there is a legal office of which he performs the functions. The argument is plausible rather than sound.

A public office is a trust or charge created and defined by the public authority. The St. of 1871, re enacted in the Public Statutes, operating throughout the State, created the office of road commissioner and defined its powers and duties. St. 1871, c. 158. Pub. Sts. c. 27, § 74 *et seq.*

Under the statute the right inheres in each town to elect its citizens to fill the office. The office potentially exists in each town, capable of being filled in a certain manner. As a preliminary to a legal election, the town must first accept the act. If

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it fails to do this, it is an illegality or irregularity in the election, but the persons who qualify and perform the functions of the office are in the position of persons who are publicly discharging the duties of a charge or trust created and defined by the general laws. The vote of the town accepting the act does not create the office. That exists by virtue of the general law, and the vote merely puts the town in a position in which it can legally fill the office by an election.

The question whether there can be a *de facto* officer when there is not a *de jure* office has been the subject of much discussion, and of conflicting decisions. We are inclined to the opinion that there cannot be such a *de facto* officer. But it is not necessary to discuss this question. There is no doubt that there may be *de jure* road commissioners in Easton; and the action of the town in the election of such officers is not legislative, but administrative in its character. As we have said, it does not create the office, but fills it.

In the case before us, the town year after year, for several years, elected road commissioners. The persons elected went on publicly performing the duties prescribed by the statute, and acting as a board of road commissioners under the sanction of the statute creating that office. All the considerations of public policy upon which the doctrine as to officers *de facto* is founded apply in this case as strongly as in any case where there is illegality in the election of officers.

We are therefore of opinion that the persons elected as road commissioners in the defendant town in the year 1883 were road commissioners *de facto*, and were public officers for whose acts the town is not responsible. *Exceptions overruled.*

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MARGARET A. CLIFFORD *vs.* ATLANTIC COTTON MILLS.

Essex. November 4, 1887. — January 9, 1888.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Personal Injuries — Landlord and Tenant — Roof — Snow.

The owner of a building with a steep and unguarded roof, who lets it to a tenant, reserving only the right to enter the "premises to repair the same," is not liable to a person injured by a fall of snow from the roof while travelling with due care upon the adjoining highway, it not appearing that the tenant might not by the use of reasonable care have prevented the accident.

TORT for personal injuries occasioned to the plaintiff by the fall of snow from a building.

At the trial in the Superior Court, before *Hammond*, J., without a jury, there was evidence that the defendant owned a block of dwelling-houses on Canal Street in Lawrence; that the block was three stories high, constructed with a steep slate roof, slanting towards the sidewalk, the ridgepole being parallel therewith, and that the roof had no protection or railing to keep the snow from falling upon the sidewalk; that the plaintiff was going along the sidewalk, in the exercise of due care, when a large quantity of snow slid from the roof of one of the houses upon her, and greatly injured her; and that a tenant occupied the house under a written lease which covered the whole house, and provided, so far as it was material, that the lessee should not "make, nor suffer to be made, any alteration in the same, but with the assent in writing" of the agent of the defendant, and "that the said agent, or any one appointed by him for the purpose, may, at any time, enter into said premises to repair the same, or to ascertain if the same are properly used."

The judge ruled that the plaintiff could not maintain her action, and found for the defendant. The plaintiff alleged exceptions.

J. M. Stearns, for the plaintiff.

D. Saunders & C. G. Saunders, for the defendant.

HOLMES, J. This is an action for personal injuries done to the plaintiff by the fall of snow from the roof of the defendant's house into the highway. The whole house was let at the time to

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a tenant, and the only difference between this case and *Leonard* v. *Storer*, 115 Mass. 86, is, that there the tenant had agreed to make all needful repairs, while in the case at bar there was no contract on either side, but the landlord reserved the right to enter the premises to repair the same, or to ascertain if the same were properly used, &c. This difference cannot affect the result, because the damage was not caused in either case by a want of repairs, but by the original character of the structure, and therefore the presence or absence of a covenant to repair has nothing to do with the question, and because the landlord's reservation of a right to enter, in the case before us, did not include the control of the roof, which the landlord was held to have had in *Kirby* v. *Boylston Market Association*, 14 Gray, 249. *Shipley* v. *Fifty Associates*, 101 Mass. 251, 254; and 106 Mass. 194, 200. See *Larue* v. *Farren Hotel Co.* 116 Mass. 67. See also *Lowell* v. *Spaulding*, 4 Cush. 277; *Payne* v. *Rogers*, 2 H. Bl. 350.

It may be that the tenant had a right to put a guard upon the roof in *Leonard* v. *Storer*, but if so, his right was independent of his covenant to repair, and the tenant had the same right in the present case. *Boston* v. *Worthington*, 10 Gray, 496, 500. See *Swords* v. *Edgar*, 59 N. Y. 28, 36; *Coupland* v. *Hardingham*, 3 Camp. 398. On the other hand, if the landlord had the right to put up a guard in the present case during the tenancy, it is not clear that he did not have it also in the other. In either case, of course, a guard might have been put up before the lease was made. The decision in *Leonard* v. *Storer* was on the ground that "it does not appear that [the tenant] might not have cleared the roof of snow by the exercise of due care, or that he could not by proper precautions have prevented the accident." The same is true here.

There is no doubt that a man sometimes may be liable in tort, notwithstanding the fact that the damage was attributable in part to the concurrent or subsequently intervening misconduct of a third person. *Elmer* v. *Locke*, 135 Mass. 575, 576. *Lane* v. *Atlantic Works*, 111 Mass. 136. *Walker* v. *Cronin*, 107 Mass. 555. *Newman* v. *Zachary*, Aleyn, 3. *Scott* v. *Shepherd*, 2 W. Bl. 892; *S. C.* 3 Wils. 403. *Dixon* v. *Bell*, 5 M. & S. 198. *Clark* v. *Chambers*, 3 Q. B. D. 327. *Winsmore* v. *Greenbank*, Willes, 577 (see 21 Am. Law Rev. 765, 769). *Lynch* v. *Knight*, 9 H. L. C.

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577, 590, 600. *Lumley* v. *Gye*, 2 El. & Bl. 216. See 1 Hale P. C. 428; *Riding* v. *Smith*, 1 Ex. D. 91, 94. But the general tendency has been to look no further back than the last wrongdoer, especially when he has complete and intelligent control of the consequences of the earlier wrongful act. See, for example, 111 Mass. 141. *Hastings* v. *Stetson*, 126 Mass. 329. *Clarke* v. *Morgan*, 38 L. T. (N. S.) 354. *Carter* v. *Towne*, 103 Mass. 507.

In the case of landlords who have given up to the tenant control of the premises in the matter out of which the damage arises, this court has never gone further than to hold them liable when the use from which the damage or nuisance necessarily ensues was plainly contemplated by the lease. See *Jackman* v. *Arlington Mills*, 137 Mass. 277; *Harris* v. *James*, 45 L. J. Q. B. 545.

It is true, that, if the nuisance exists when the premises are let, the landlord can be held, although the tenant may be liable also to the person injured, for the landlord is taken to have contemplated the premises remaining in the condition in which he let them. *Dalay* v. *Savage*, 145 Mass. 38, 41. *Todd* v. *Flight*, 9 C. B. (N. S.) 377. *Swords* v. *Edgar*, 59 N. Y. 28, 34. *Joyce* v. *Martin*, 15 R. I. 558. But courts have differed when the nuisance existing at the time of the lease was due to want of repairs, and the tenant had covenanted to make repairs. *Pretty* v. *Bickmore*, L. R. 8 C. P. 401. *Gwinnell* v. *Eamer*, L. R. 10 C. P. 658. *Swords* v. *Edgar*, *ubi supra*. And the landlord will not be liable for the use of the premises in such a way as to do harm, merely because there was a manifest possibility of their being used in such a way. The liability will stop with the tenant whose intervening wrong is the immediate cause of the damage. *Mellen* v. *Morrill*, 126 Mass. 545. *Rich* v. *Basterfield*, 4 C. B. 783. *Gandy* v. *Jubber*, 5 B. & S. 78, 90; 9 B. & S. 15, 16. *Nelson* v. *Liverpool Brewery Co.* 2 C. P. D. 311. *Edwards* v. *New York & Harlem Railroad*, 98 N. Y. 245. In such cases it cannot matter whether the wrong on the part of the tenant is an act which makes the premises a nuisance, or an omission which allows them to become so. It is as much his duty to act in the latter case as it is to abstain in the former. In either, as against the public, the landlord, unless he has assumed the duty himself by covenant, has a right to rely upon the tenant's managing the premises in his occupation in such a way as to pre-

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vent their being a nuisance. *Stewart* v. *Putnam*, 127 Mass. 408, 406. *Lowell* v. *Spaulding*, 4 Cush. 277. *Russell* v. *Shenton*, 3 Q. B. 449. 1 Chitty Pl. (7th ed.) 94.

The defendant's house was not a nuisance in itself. If it was, half the householders in Boston are indictable at the present moment. It was certain to become so at times by the mere working of nature alone, unless the tenant cleared the roof, or took other steps to prevent it. But, so far as appears, the tenant could have done so by using reasonable care. If he could, it was his duty to do so, and the landlord was not liable, for the reasons which we have stated. *Exceptions overruled.*

JOHN CULLEN *vs.* CATHARINE CAREY.

Essex. November 7, 1887. — January 9, 1888.

Present: MORTON, C. J., FIELD, W ALLEN, C. ALLEN, & HOLMES, JJ.

Absolute Conveyance — Mortgage — Devisee — Reconveyance.

A creditor, under an agreement with his debtor to hold land as security for the debt, got a title thereto by levy of execution on a judgment obtained by consent and by foreclosure of a mortgage. *Held*, that the transaction was a mortgage, and that a general devisee of the creditor could be compelled to reconvey.

BILL IN EQUITY to compel the reconveyance of land on the ground that the transaction by which the defendant's testator gained title was in substance a mortgage. Writ dated December 24, 1885.

In the Superior Court the case was referred to a master, who found the following facts:

In 1869 the plaintiff bought the land in question, subject to a mortgage, and proceeded to erect a tenement house. Leonard Carey, the husband of the defendant, who was a carpenter and indebted to the plaintiff for money lent, built the house for the plaintiff, supplying nearly all the materials and labor under an oral agreement whereby his indebtedness to the plaintiff was to be applied in payment of the cost of construction. When the house was completed, the balance due Carey, after paying his debt to the plaintiff, was $1,106, and the value of the house and

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land above the existing mortgage was $3,300. The plaintiff moved into the house and occupied it about six months.

On or about June 1, 1870, the plaintiff and Carey made an oral agreement that Carey should gain title to the premises by levy on execution, and by a sale under the power in the mortgage, and hold them as security for the plaintiff's debt to him, and, after payment of the debt and expenses out of the rents, should reconvey to the plaintiff. In pursuance of this agreement, the plaintiff, on June 1, 1870, gave to Carey a note for $4,000, upon which an action was brought and judgment obtained by default against the plaintiff as agreed. An execution was issued and levied by a sale to Carey of the plaintiff's equity of redemption in the premises for $4,317.39, and a conveyance in due form was made to him on May 29, 1871. On July 6, 1871, Carey, by the payment of $583.17, procured the assignment of the mortgage to a third person, who proceeded in due form to sell the premises under the power therein to Carey for $950, and a deed was given to him and duly recorded.

Prior to the sale on execution and under the mortgage, Carey was put in possession of the premises by the plaintiff, and so continued until his death, on October 25, 1885. At various times the plaintiff demanded of Carey a settlement and reconveyance of the premises, his last demand being made a few days before Carey's death, in the presence and hearing of the defendant. Carey made a will, by which his real estate was devised to the defendant, who took possession of the premises and continued to receive the rents and profits. The defendant declined to file an account, but it was agreed by both parties that the receipts by Carey and the defendant had been sufficient to pay the plaintiff's debt to Carey, including interest and expenses. The master also found that there had been no laches on the part of the plaintiff.

The case was then heard on the report of the master, and a decree was entered that the defendant convey the premises to the plaintiff. The defendant appealed to this court.

N. P. Frye, for the defendant.

J. C. Sanborn, for the plaintiff.

MORTON, C. J. It was held in *Campbell* v. *Dearborn*, 109 Mass. 130, that, although a deed be given which is absolute in

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form, yet the grantor may prove by parol testimony that it was understood and agreed by both parties to be given as security for a debt; and that upon such proof a court of equity will treat the deed as a mortgage. This is decisive of the case at bar.

For some reason, which does not appear to be fraudulent, the plaintiff did not directly convey the estate in question to the defendant's testator; he permitted the latter to obtain a judgment upon a debt in part fictitious, and thus to get a title by a levy upon the execution, and also to foreclose by a sale under an existing mortgage. But the substance of the transaction was the same as if a deed had been directly given by the plaintiff. Both parties agreed that the title thus obtained was to be held solely as security for the debt of the plaintiff to the defendant's testator, and a court of equity will treat the transaction according to its real nature as a mortgage.

The defendant does not stand in the position of an innocent purchaser, as she contends. She took as a general devisee under the will of her husband, and besides is shown to have had notice of the nature of the transaction. *Decree affirmed.*

FRANKLIN F. PATCH *vs.* CITY OF BOSTON.
SAME *vs.* SAME.

Suffolk. November 15, 1887. — January 9, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Land Damages — Evidence — Tribunal — Boston — Court-House.

Under the St. of 1885, c. 377, authorizing commissioners to take land in Boston for a new court-house and providing that damages should be assessed as "in case of the laying out, altering, or discontinuing of ways within the city of Boston," such damages are to be assessed in the first instance by the street commissioners of Boston, and not by the court-house commissioners.

On the assessment of damages for land taken by a city, evidence of the cost of a recent addition to the house thereon is inadmissible.

A declaration of opinion as to the value of land taken by a city, made by the owner and occupant for seventeen years to an assessor over a year before the taking, and also before an addition was built to the house thereon, is competent as an admission against such owner.

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On the assessment of damages for the taking by a city of land with a building thereon, evidence was offered on the part of the city of the price at which neighboring estates in the same street with buildings thereon were sold a few months after the taking, it appearing that the effect of the taking had been, if any, to increase the value of such property. *Held*, that, in the absence of proof that the buildings were dissimilar, the evidence was rightly admitted.

TWO PETITIONS for juries to assess damages for the taking of land in Boston for a new court-house. The cases came on for trial together in the Superior Court, before *Blodgett*, J., who dismissed the first petition and allowed a bill of exceptions, which appear in the opinion.

E. W. Hutchins, for the petitioner.

T. M. Babson, for the respondent.

C. ALLEN, J. This was a petition to the Superior Court, setting forth that the petitioner was the owner of a parcel of land on Somerset Street in Boston; that the court-house commissioners appointed by the Mayor of Boston had taken said land for a court-house, under the St. of 1885, c. 377; that he had been offered by said commissioners a very much less sum than the damages sustained by him; and praying that his damages might be ascertained by a jury, at the bar of the Superior Court.

It appeared that the street commissioners also had made an award of damages for the same taking, with which the petitioner was dissatisfied, and accordingly he had filed another petition praying that his damages might be ascertained by a jury, at the bar of the Superior Court.

Both of these petitions came on to be heard together in that court, and after the reading of the petitions and answers the petitioner declined to elect upon which petition he would go to trial. No objection to the form of proceedings was made by the city in either case, but in the answer to each petition the city said that, if any land or property of the petitioner had been taken for any public use of the city of Boston, the city was, and ever since such taking had been, ready and willing to pay all damages caused thereby, for which it was liable. Under these circumstances, the petitioner declining to elect which petition he would go to trial on, the court ruled that the court-house commissioners had no authority to award damages for the taking of the petitioner's land, but that the street commissioners of the city of Boston were the persons to award the damages, and therefore that the present

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petition could not be maintained. The parties went to trial upon the other petition, without any exception being saved by the city, and the petitioner's damages were assessed by the jury.

By the St. of 1885, c. 377, the board of commissioners appointed by the mayor is authorized to take land for a court-house, by purchase or otherwise, and the city is to be liable to pay all damages that shall be sustained by any person or persons by reason of the taking of such land; such damages to be ascertained and determined in the manner provided for ascertaining and determining damages in case of the laying out, altering, or discontinuing of ways within the city of Boston. In Boston, such damages are determined in the first instance by the street commissioners; that is, they have the same power in Boston as county commissioners in other counties, and this includes the estimate of such damages. Pub. Sts. c. 49, §§ 14, 84. A party aggrieved by the doings of the street commissioners in the estimation of damages may apply for a jury by petition to the Superior Court. Pub. Sts. c. 49, § 86.

Under a statute somewhat similar to the one now under consideration, namely, the St. of 1864, c. 104, authorizing the city of Worcester to supply itself with water, and providing that all damages should be assessed in the manner provided in the general laws in regard to highways, it was held that a claimant should petition in the first instance to the county commissioners. *Worcester* v. *County Commissioners*, 100 Mass. 103. To a similar effect is *Riley* v. *Lowell*, 117 Mass. 76. Certain differences in matters of detail have been pointed out by the counsel for the petitioner, but the reasons assigned by the court in those cases, in substance, cover the present case.

If the legislature had intended that the court-house commissioners, being a special body created for the particular purpose, should make the assessment of damages, they would have been likely to say so in express terms. Usually, we believe, when any special board or committee is to make the first assessment of damages, the statute plainly so provides. But where the provisions in reference to the ascertainment of damages is merely a general one, referring to the mode of ascertaining damages in other cases of frequent occurrence, it is natural and reasonable to suppose that all the incidents of such mode are included, as

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far as the same are applicable. Especially should this construction be given to the St. of 1885, c. 377, which contains no express provision for a jury in any case. If the legislature had meant that the court-house commissioners should assess the damages in the first instance, it would have been natural and probable that an express provision for a jury would have been inserted. But if they meant that the street commissioners should assess the damages, there was no occasion for such special provision, as the general provision already referred to would cover it. On the whole, we think it the better construction of the statute to hold that the duty of estimating damages in the first instance belonged to the street commissioners. *Exceptions overruled.*

THE trial proceeded upon the second petition, and the petitioner testified that about May 1, 1885, three months before the taking, he built an addition to the L of his dwelling-house, making it a story higher, whereby another room was added to the building, and offered to show the cost of the addition. The judge ruled that evidence of the cost of the addition was incompetent, and excluded it.

On cross-examination, the petitioner was asked whether he had not stated to one Browne, an assessor, in 1884, that his house was worth less than $22,000, to which he replied that he had not. The respondent afterwards offered to show by Browne, that in the first week in May, 1884, Browne and his clerk met the petitioner coming out of his house, and he asked them what his house was taxed for; that they told him that in 1883 it was taxed for $22,000, and that the petitioner said, "That is too much; you ought to reduce it; it is more than it will sell for; it is more than it is worth;" that Browne said he could sell it for him for that, and that the petitioner said he did not want to sell, but it was more than it was worth. To this evidence the petitioner objected, but the judge admitted it. Except as stated, there was no evidence that the petitioner was acquainted with the value of the property, or that he was fitted to give an opinion upon it, and he was not asked by either side what his opinion of its value was. The petitioner had owned the estate for about seventeen years, and during that time occupied it as his dwelling-house, until within a few months before the taking

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The respondent offered to put in evidence the price at which two other pieces of land, with buildings upon them, on Somerset Street, near the estate of the petitioner, were sold in 1886, a few months after the taking, it appearing that the effect of the taking had been, if any, to increase the value of such property. To this evidence the petitioner objected, but the judge found that the estates were situated similarly to that of the petitioner, and admitted the same.

The jury returned a verdict assessing the petitioner's damages; and the petitioner, being dissatisfied therewith, alleged exceptions.

E. W. Hutchins, for the petitioner.

T. M. Babson, for the respondent.

C. ALLEN, J. The exceptions in the present case present three questions as to the exclusion and admission of testimony.

1. The first question is as to the exclusion of the testimony offered by the petitioner as to the cost of the addition to the L. As a general rule, the market value of the property is the measure of damages. Ordinarily, the cost is not material, and especially the cost of some particular improvement, which, however convenient to the owner, may not correspondingly increase the market value. In the case of goods which are constantly manufactured and sold in the market, evidence of the cost has been received, as having a direct tendency to show the value. *Clement* v. *British American Assurance Co.* 141 Mass. 298, 301. But the addition of special improvements in buildings does not fall within the same reason. *Allen* v. *Boston*, 137 Mass. 319, 321. In the present case, all that was offered in evidence to make the cost admissible was, that, three months before the taking the plaintiff built an addition to the L of his dwelling-house, making it a story higher, whereby another room was added to the building. There was nothing to show that the cost of this addition would aid in determining the market value of the whole estate, or that the value of the whole estate would depend closely on the cost in detail of improvements made upon it from time to time. We see no error in the exclusion of the testimony.

2. The objection, that an owner and occupant of a house for seventeen years must be shown to be qualified to judge of the value of real estate, before his expressed statement of an opinion

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of its value can be received in evidence against him, savors of too much refinement for practical purposes, and cannot be adopted. Usually such owner and occupant may be presumed to have a sufficient opinion of the value of his property to make his admission competent against himself. See *Flint* v. *Flint*, 6 Allen, 34. *Whitman* v. *Boston & Maine Railroad*, 7 Allen, 313. The other objections to his opinion go rather to the weight and importance than to the competency of the statements, and cannot prevail. Much must be left to the discretion of the presiding judge in determining whether the time was too remote, and the condition of the property too dissimilar, to make the evidence valuable; and exceptions should not be sustained on such grounds, unless a manifest error has been committed. *Shattuck* v. *Stoneham Branch Railroad*, 6 Allen, 115, 117. *Chandler* v. *Jamaica Pond Aqueduct Co.* 122 Mass. 305.

3. The last exception taken by the plaintiff was to the admission in evidence of the prices at which two other estates on the same street, and near the plaintiff's estate, were sold, a few months after the taking. It is admitted that ordinarily sales of other similar lands in the vicinity, at or about the time in question, may be shown. *Chandler* v. *Jamaica Pond Aqueduct Co.*, *ubi supra*. But it is contended that the rule does not include sales of land with buildings thereon, or sales made so long afterwards, and after there had been a change of value. If it had appeared that the buildings upon the lots which were sold were quite unlike those upon the plaintiff's land, there would be force in the objection; but this does not appear. Houses on the same street in a city often correspond closely in style, cost, and value. The mere fact that buildings were upon the land does not of itself have the effect to vary the rule of law that sales of other similar lands may be shown, upon the question of value; but it is in such case, as in all others, to be determined by the court whether on the whole there was such a general similarity that the price obtained on the sale of one estate may fairly tend to show the value of the other. The objection founded on the time when the sales were made has at first sight more plausibility; but the aspect of the case, at the time the evidence was admitted, must be considered. The city did not ask to have any allowance made by reason of an increase of value after the tak-

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ing, but offered evidence to show that, even with such increase in value as may have resulted from the taking of land for the court-house, estates in the vicinity had been sold at rates lower than the plaintiff claimed as the value of his property. It might, indeed, have been different if the respondent had asked the jury to form an opinion as to the rise in value, and to make allowance for that; but the position of the respondent, as we understand the bill of exceptions, was just the reverse; the respondent in substance said, "We will offer as a standard sales made at a later date, when the effect, if any, had been to increase the value of such property; we will give you the benefit of that; and even then your claim is excessive."

There was nothing to show that in point of fact there had been any substantial increase of value, or that it was contended before the jury that there had been. It must now be presumed that the city made no claim on the ground of any such supposed increase of value; and in this aspect the plaintiff has no ground of exception. *Exceptions overruled.*

WILBUR M. BELL *vs.* JOHN Q. A. PIERCE.

Middlesex. November 15, 1887. — January 9, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Bail Bond — Validity — Assignment — Sheriff.

A bond, invalid as a bail bond under the Pub. Sts. c. 163, § 2, as not made to the sheriff or other officer, may be effective on acceptance by the obligee.

An obligee on an invalid bond to release from arrest, who repudiates it when brought to his knowledge, and when the sureties could have surrendered the principal debtor, cannot, on payment of the judgment by the sheriff, assign the bond to him so as to bind the sureties.

CONTRACT on a bond executed by the defendant and others as sureties, and by Frank T. Fay as principal, reciting that they were "holden and stand firmly bound unto Wilbur M. Bell," and conditioned that Fay, who had been arrested on mesne process in an action of contract in which Bell was also plaintiff, should

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appear before the Superior Court, abide its final judgment, and not avoid. The bond was approved by a master in chancery.

Trial in the Superior Court, before *Knowlton*, J., without a jury, who found the following facts:

The bond declared on was executed by the defendant and his co obligors as and for a bail bond for the purpose of relieving Frank T. Fay from imprisonment on mesne process, and was delivered to the jailer as a public officer, who received and accepted the same in his official capacity, and thereupon, deeming it a good and sufficient bail bond, discharged Fay from arrest. Bell, who was also the plaintiff in the original action, resided in Vermont, and all his business here was done by F. E. Crawford, his attorney. Neither Bell nor Crawford saw the bond until after the recovery of judgment in the original action, or ever accepted it. Samuel P. Abbott, an attorney at law, acted for Fay and for the defendant and other sureties upon the bond. Within less than thirty days after judgment was recovered, Abbott, acting for Fay and the sureties upon the bond, saw Crawford at his office in Boston, and told him that Fay was in Boston, and inquired if Crawford wanted Fay in this matter, and was answered in the negative. He also spoke about having Fay delivered into the jail, and Crawford replied that in case of such delivery he should treat Fay as an outsider, and should have nothing to do with him, and that in any event he should hold the sheriff responsible for his judgment. Abbott also applied to the clerk of the Superior Court for a copy of the bail bond, with a view to the surrender of Fay within thirty days after the judgment, but was unable to obtain it because no proper bond had been filed. The sureties upon the bond desired to surrender Fay to relieve themselves from liability, and would have so surrendered him if the bond had been in proper form, or if the plaintiff would have accepted the body of Fay and discharged them from liability. Subsequently the sheriff took an assignment of the judgment in favor of said Bell against said Fay, and paid the amount thereof, and also took an assignment of the bond, and brought and is now prosecuting this suit in the plaintiff's name for his own benefit.

On these facts, the judge found for the defendant, and the plaintiff alleged exceptions.

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A. S. Hall, for the plaintiff.

B. B. Johnson, for the defendant.

C. ALLEN, J. The bond was not valid as a bail bond, since it ran directly to the plaintiff in the action, and not to the sheriff or other officer. Pub. Sts. c. 163, § 2. The approval of the master in chancery, therefore, signified nothing. But the bond might be valid at common law, if approved and accepted by the obligee. *Pratt* v. *Gibbs*, 9 Cush. 82. An actual or implied acceptance is essential, in order to constitute a delivery. *Hawkes* v. *Pike*, 105 Mass. 560. *Chase* v. *Breed*, 5 Gray, 440. 4 Kent Com. 454. Met. Con. 14. In the present case, the plaintiff never authorized nor ratified the taking of the bond; on the other hand, he always repudiated it. Up to the time of the assignment, he obviously intended to do no act to accept or ratify it, and declared, by his counsel, that in any event he should hold the sheriff responsible for the judgment. He thus treated the bond as invalid at a time when, if valid, the sureties could and would have saved the condition by surrendering their principal. It was too late afterwards to make it valid and binding upon them by an act done without their consent and to their injury. Under the circumstances, the assignment of the bond to the sheriff, upon the payment by the sheriff of the amount of the judgment, could not have the effect to give vitality to a bond which up to that time was invalid. *Exceptions overruled.*

JOSEPH B. MOORS *vs.* FERDINAND A. WYMAN & others.

Suffolk. November 16, 17, 1887. — January 9, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Advances — Pledge — Bill of Lading — Sale — Commission.

A banker made advances to leather merchants on hides, for which bills of parcels were given to him or bills of lading taken to his order or indorsed to him with power to take possession and sell for his security or reimbursement. He indorsed the bills of lading to the firm to get the hides from the carriers, and gave it the custody upon its express agreement to hold as his agents and to redeliver the identical hides when tanned. *Held*, that the banker took the title to the hides, and did not divest it by his indorsement or release of custody.

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On the failure of the firm the banker took possession of the hides as they arrived, and sold them at private sale through reputable brokers at fair prices. *Held*, that the sales were valid, and that the banker was entitled to a reasonable compensation.

A trustee of the firm, holding under a voluntary assignment for the benefit of creditors, charged the banker commissions for sales of leather, and for tanning hides in the vats to prevent their loss. *Held*, that the former item and the latter item, above a certain limit, were rightly disallowed.

HOLMES, J. This is a bill in equity brought by a creditor of the Boston firm of F. Shaw & Brothers, consisting of Fayette Shaw and Brackley Shaw, against that firm; against another firm in Vanceboro, Maine, of the same name, consisting of the above-named Shaws and Thaxter Shaw; and against Ferdinand A. Wyman, to whom both firms have made voluntary assignments for the benefit of creditors. As the objections to the jurisdiction are now waived, and as the assets in controversy have been converted into money, and a large part of the plaintiff's claim has been paid since the filing of the bill, leaving only certain items of the account in dispute, such only of the facts need be stated as are necessary in order to settle these disputed items.

The plaintiff, Moors, made advances to the Boston firm in several ways. 1st. Under what is called the loan account agreement, by indorsing their notes, &c., in Boston, taking as security bills of parcels of specified hides, which the Vanceboro firm were tanning for the Boston firm, and which were delivered by the Boston firm to and held by Thaxter Shaw as agent for the plaintiff with the consent of the Vanceboro firm. The Vanceboro firm agreed that the cost to Moors for tanning should not exceed four cents per pound, and in fact all charges for tanning were paid by the Boston firm to the Vanceboro firm. By the Boston firm's agreement, Moors had power in case of default, or if in his opinion the collateral did not afford a margin of twenty-five per cent above the amount unpaid, to sell at public or private sale without notice; and it was further agreed that all collateral security held by Moors for the Boston firm's account, whether under that contract or otherwise, might be taken and applied as general security for all existing or subsequent indebtedness. This account has been paid off in great part, since the filing of the bill.

2d. The plaintiff issued to the Boston firm letters of credit on Morton, Rose, & Co., of London, under which the firm bought

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hides, taking bills of lading to the plaintiff's order by agreement, the plaintiff having a lien on the goods, bills of lading, and policies of insurance, with authority to take possession and dispose of them at his discretion for his security or reimbursement. Before the defendant's failure the practice was for the plaintiff to indorse the bill of lading to the Boston firm, they signing a contract by which they received the hides as his agents, and agreed as such agents to send the hides to specified tanneries of theirs in Maine or New York, and to deliver to the plaintiff upon demand the identical leather into which the hides should be manufactured, the plaintiff not to be chargeable with any expense thereon. The intention of the agreement was stated to be to protect and preserve unimpaired the plaintiff's lien. After the failure the plaintiff took possession of the hides as they arrived, and sold them through reputable brokers for fair prices. The plaintiff has paid Morton, Rose, & Co. the whole amount due them.

3d. The plaintiff obtained letters of credit for the Boston firm drawn upon the Bank of Montreal by the agents of the bank, the Boston firm giving the bank an agreement similar to that with Moors, last mentioned, with authority to the agents to take possession of the goods and dispose of the same at discretion, and to charge all expenses, including commissions, for sale and guaranty. Upon the arrival of the hides the agents of the bank indorsed the bills of lading to Moors, who before the failure indorsed them to the Boston firm under the same form of agreement as stated with regard to bills of lading under the Morton, Rose, & Co. credit. The hides arriving after the failure were sold by him in like manner as before stated. The plaintiff has paid the bank the whole amount due to it.

It is argued for the Shaws that Moors received the indorsed bills of lading as agent of the Bank of Montreal, and that, however this may be, he has lost his rights in all hides received by him under any bills of lading before the failure, and turned over to the Boston firm as Moors's agents. But upon the record before us we must take it that Moors received the hides, as the master's report implies that he did, on his own behalf. The agents of the bank looked to him for payment, and they have been paid. The bank had a title, whether absolute or qualified does not matter. See *De Wolf* v. *Gardner*, 12 Cush. 19; *Forbes*

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v. *Boston & Lowell Railroad*, 133 Mass. 154, 156. *Moors* v. *Kidder*, 106 N. Y. 32. Moors got this title by indorsement, and had a similar title originally under the Morton, Rose, & Co. bills of lading. His indorsements of the bills of lading to the Boston firm as his agents did not release this title. It was not a conveyance in form, and being made only for the purpose of enabling him to get the goods from the carriers, it was not a conveyance in substance or effect. See *Moors* v. *Kidder*, *ubi supra*; *Pratt* v. *Parkman*, 24 Pick. 42, 47; *Low* v. *De Wolf*, 8 Pick. 101, 107.

Neither did Moors lose his rights by giving the custody of the hides to the Shaws. They expressly agreed to hold as Moors's agents, and the general rule is perfectly well settled that the custody of a servant or of a mere agent to hold is the possession of the master or principal. The only difficulties that have arisen have been due to the failure to distinguish accurately between such servants or agents and bailees who hold in their own name; *Hallgarten* v. *Oldham*, 135 Mass. 1, 9; or, in the case of pledges, between a delivery to the pledgor for his own purposes and intrusting him with the custody on behalf of the pledgee. *Kellogg* v. *Tompson*, 142 Mass. 76, 79. It might be argued that policy requires an exception to be made in favor of a *bona fide* purchaser for value from the general owner having the seeming possession of the goods, as against a person whose security depended upon possession, and who had made the owner his custodian. But the Massachusetts cases tend to show that there is no such exception in the absence of fraud. *Kellogg* v. *Tompson*, and *Moors* v. *Kidder*, *ubi supra*. *Thacher* v. *Moors*, 134 Mass. 156, 165. At all events, there is nothing in this case to warrant our making one, even assuming that all parties before us are not concluded by the express agreement of the Shaws that the plaintiff's rights should remain. There is nothing in Wyman's position, as to proceeds in his hands, to diminish the rights which Moors had as against the Shaws, nor do his counsel argue that there is, so far as the question of possession is concerned.

The plaintiff has charged a commission of five per cent on the hides sold by him, of which rather more than nine tenths in value was imported under the Morton, Rose, & Co. credit, the rest under that of the Bank of Montreal. The defendants deny

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his right to sell at private sale, and more particularly deny his right to charge any commission. We see no reason to doubt that the sale was lawful, and we are of opinion that the plaintiff should be allowed the sum which the master has found to be a reasonable compensation for the services actually rendered by him, namely, two and one half per cent upon the gross sales, or $5,080.65. The argument is strong that the loan account agreement, authorizing the plaintiff to apply all security to any indebtedness, imports an application in the manner and with the incidents there set forth, one of which was a charge of two and one half per cent commission. All of the facts tend to the conclusion that a commission was to be charged. See, further, *Varnum* v. *Meserve*, 8 Allen, 158, 161.

It is admitted that there was due to the plaintiff on April 1, 1886, the sum of $61,448.87, as found by the master. Adding the commission, the amount is $66,529.52. By the master's findings the defendant Wyman had in his hands on the same date $89,533.34, proceeds of the plaintiff's security, or more than enough to pay what remains due, unless Wyman has a right to make certain charges which have been disallowed by the master.

The first of these is a charge of five per cent commission for sales made by Wyman. The master found no agreement to that effect with the plaintiff, and rightly disallowed the charge. There is no reason why a debtor selling his own property to pay his debts should charge his creditor for doing so, and there is no reason why Wyman in this respect should stand in a better position than the Shaws. So far as the sales were made by agreement, the agreement excluded the right to make a charge. It is at least a fair inference that he made the other sales, if rightful, on the same footing.

Wyman's second charge is for tanning the hides which were on hand at the time of filing the bill, and which were mostly in the process of tanning, and could not be removed without serious injury. The master finds that there was no agreement or understanding between the plaintiff and Wyman that the latter should make any charge to the plaintiff for tanning.

One item of $43,298.64 was charged for tanning leather which Wyman agreed to deliver to purchasers, as Moors's agent, and

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the proceeds of which in money he further agreed to deliver to Moors as soon as received, his contract expressly stating that Moors was not to be chargeable with any expense incurred thereon. It will be seen that this agreement follows the form of the original contract of the Boston firm as to letter of credit hides, with such change only as was required by the fact that Wyman received the purchase money for the leather in the first place. We think that the master was plainly right in disallowing this charge.

The remaining item is $36,710.43, being the difference between four cents a pound allowed by the master, and seven cents, the actual cost of tanning. Of this sum, according to the statement of Wyman's counsel, $13,972.89 was for tanning loan account hides, for which the Vanceboro firm agreed that the cost to Moors should not be more than four cents. In the absence of agreement to the contrary, the master was warranted in finding that, as to these hides at least, Wyman proceeded on the terms of the contract, and could not charge more than four cents, if entitled to charge anything. There was nothing to preclude such a finding in the fact that Moors took possession of the bill of lading hides arriving after the failure. He had a right to do so, and if he had not had the right, we could not say, as matter of law or fact, that his doing so imported a repudiation of the distinct contract relations as to the loan account hides in the tannery.

There is left, then, only $22,737.54 in dispute, which might be deducted from the amount in Wyman's hands and yet leave enough to pay the plaintiff. As to this sum, we think that the allowance of four cents was sufficiently favorable to the defendants, and, if it were necessary to go further in order to secure the plaintiff's rights, we should have some difficulty in finding a warrant for making any allowance at all. The hides were bill of lading hides, which by the original agreement were to be manufactured into leather without any expense to Moors or the Bank. Such bill of lading hides as Wyman did make an agreement about, he undertook to deal with in the same way. On these facts alone the argument against his right to charge is strong. But, further, bearing in mind that these hides were to be tanned and held by the Boston firm, and that the Vanceboro firm had nothing to do with them, if that fact be material, it is to be

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observed that where the holder of the equity of redemption in property, or of a kindred interest, makes improvements upon it necessary to preserve it from destruction or great loss, he may be presumed to make such improvements in the interest of the equity, for the purpose of at least diminishing the claim upon his general funds not pledged, and, if possible, of obtaining a surplus. Undoubtedly, it was for the interest of the creditors of the Boston firm that the hides should be tanned rather than be spoiled. The principle is the converse of that which allows a mortgagee to charge for reasonable improvements. *Merriam* v. *Goss*, 139 Mass. 77, 82. There are obvious objections to allowing the holder of the equity to create a lien superior to an existing mortgage. Even if the Vanceboro firm were concerned, it would not necessarily change our opinion upon the matter, in view of the circumstances of this case.

Decree accordingly.

R. M. Morse, Jr., for the plaintiff.

E. R. Hoar & Samuel Hoar, for the defendant Wyman.

J. C. Lane, for the defendants Shaw.

CHARLES D. COOK & others *vs.* FREDERICK H. HOLBROOK & another.

Suffolk. November 18, 1887. — January 9, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Voluntary Conveyance — Fraud — Question of Fact.

Whether a voluntary conveyance, made on a meritorious consideration by a person deeply indebted, is fraudulent and void as to existing creditors, is a question not of law but of fact for the jury upon all the circumstances of the transaction.

BILL IN EQUITY to reach and apply real estate in payment of a debt. In the Superior Court issues were framed for a jury, and *Pitman*, J., allowed a bill of exceptions, which, so far as material, appear in the opinion.

H. Baylies, for the plaintiffs.

S. J. Thomas, for the defendants.

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MORTON, C. J. The object of this suit is to reach and apply in payment of the plaintiffs' debt certain real estate conveyed by their debtor, the defendant Holbrook, to the defendant Russ. The conveyance was a voluntary one, made by said Holbrook for the benefit of his children to the defendant Russ as trustee, and the plaintiffs were pre-existing creditors.

The court gave instructions to the jury as to the legal meaning of fraud which would invalidate such a conveyance, which were not excepted to, and are presumed to be appropriate. The plaintiffs requested the court to rule that "fraud, in a voluntary conveyance, such as this is shown to be, so far as concerns existing debts, is an inference of law." The refusal to give this ruling presents the only question before us.

There is some confusion and contradiction in the adjudged cases as to the effect of a voluntary conveyance by a debtor upon the rights of his creditors; but the law is well settled in this Commonwealth that a conveyance made on the meritorious consideration of blood, or affection to a child, or as a settlement to a wife, is not, as matter of law, fraudulent and void as to existing creditors. Whether it is so or not depends upon all the circumstances of the transaction. If made when a person is deeply indebted, it furnishes *prima facie* evidence of fraud; but this may be rebutted or controlled, and the question of fraud is not one of law, but of fact for the jury. *Lerow* v. *Wilmarth*, 9 Allen, 382. *Winchester* v. *Charter*, 12 Allen, 606. *Draper* v. *Buggee*, 133 Mass. 258.

The ruling requested was therefore properly refused.

Exceptions overruled.

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SARAH S. LANE *vs.* CHARLES F. CHADWICK.

Dukes County. November 28, 1887. — January 9, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Consignor and Consignee — Carrier — Delivery — Title — Replevin.

A consignee of goods sent C. O. D. cannot maintain replevin against the carrier before payment and delivery.

REPLEVIN of certain goods. Trial in the Superior Court, without a jury, before *Hammond*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff ordered the goods from wholesale druggists in Boston to be shipped to her by express C. O. D. The goods were so shipped, nailed up in two boxes, and accompanied by an itemized bill. The defendant, an express messenger, took the goods to the plaintiff's store, and demanded the amount of the bill with express charges on delivery of the boxes. The plaintiff refused to pay until she had had an opportunity to examine the contents of the boxes, and to compare the contents with the bill. The defendant refused to permit such an examination, and took the boxes away. There was evidence tending to show that the defendant told the plaintiff, when he brought the boxes, that if the boxes did not contain the goods ordered by the plaintiff he would not refund the C. O. D. charges after payment to him.

Subsequently the plaintiff procured this writ and went to the defendant with the officer, and in his presence tendered to the defendant the amount of the bill and express charges; and, showing the bill of items, demanded that those specific goods be delivered to her. The defendant replied that he knew nothing about those particular goods, and could not be responsible for the contents of the boxes, but said he was ready to deliver the boxes. The plaintiff refused to accept the boxes without knowledge of their contents, and the writ was served. The goods named in the itemized bill were all in the boxes. The

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plaintiff also introduced evidence tending to show that after this last tender she made an absolute tender of the money and demanded the boxes.

The plaintiff asked the judge to rule, that, under a C. O. D. contract like the one in this case, if the consignee pays the carrier's charges, and tenders the price of the goods, the consignee has a right to have it certain that the goods are present before he actually parts with his money, especially when told that the money would not be refunded even if the boxes did not contain the goods so ordered C. O. D. The judge refused so to rule, and found for the defendant.

The plaintiff alleged exceptions.

P. H. Hutchinson & C. G. M. Dunham, for the plaintiff.

H. M. Knowlton, for the defendant.

MORTON, C. J. To maintain replevin, the plaintiff must show that, at the time she sued out her writ, she was entitled to the immediate and exclusive possession of the goods replevied. *Collins* v. *Evans*, 15 Pick. 63. *Wade* v. *Mason*, 12 Gray, 335.

The goods in suit were delivered to the defendant, who is a common carrier, by the consignor in Boston, to be transported to the plaintiff. They were in two boxes securely nailed up, and were accompanied by an itemized bill. The defendant was instructed to deliver the goods to the plaintiff upon the payment of the bill by her in cash.

The delivery to the carrier was not a delivery to the plaintiff. He was not her agent, but the agent of the consignor. *Merchants' National Bank* v. *Bangs*, 102 Mass. 291. Until he delivered the goods to her, no title or right of possession would pass to her, and it is immaterial whether he rightfully or wrongfully refused to make the delivery. At the time she replevied the goods, she had no title or right of possession. *Exceptions overruled.*

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CORNELIA A. JOHNSON *vs.* MARIAN B. KNAPP & others.
SAME *vs.* ANSON GAGE & others.

Franklin. September 20, 21, 1887. — January 10, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & KNOWLTON, JJ.

Deed — Incumbrances — Adverse User — Implied Grant — Power of Attorney.

An owner of land, to which was appurtenant the right to draw water through an aqueduct, conveyed the upper part with a like right, "reserving the privilege of conveying water" across the same to the lower part. The heirs of the owner conveyed the lower part with the "same privilege of drawing water and conveying the same" as their ancestor enjoyed "in his lifetime," covenanting against incumbrances. *Held*, that the right of the grantee of the upper part to take water was not an incumbrance within such covenant.

Evidence of the drawing of water from an aqueduct and its use on one lot for less than twenty years under an unrecorded grant, and of the first drawing on another lot twenty years before and its continued use thereon with the knowledge but without the consent of an owner of the aqueduct, and without any assertion of a claim of right, is insufficient to establish a right by adverse user.

An owner of two estates, to one of which was appurtenant a right to draw water from an aqueduct, while the other was supplied with water from the aqueduct through pipes maintained in the former estate, such maintenance being necessary to its enjoyment, conveyed the latter with no mention of the water or pipes. *Held*, that a grant of the right to maintain such pipes would be implied.

A power of attorney to make and deliver a good and sufficient deed "with or without covenants of warranty," as fully as if the grantor was personally present, authorizes the insertion of a covenant against incumbrances.

TWO ACTIONS OF CONTRACT. The declaration in each case alleged that the defendants, who were the heirs of Levi Gage, had, by a deed dated December 28, 1880, and acknowledged on December 31, 1880, conveyed an undivided half of a lot of land to the plaintiff; that each deed contained a covenant against incumbrances; and that the owners of other lots, named Williams, Pomeroy, Flint, and Clark, had each the right "to take and carry water from and through said land to his dwelling-house by means of one or more pipes, and to enter upon said land and repair said pipes when necessary so to do," which right constituted a breach of said covenant. In the first case, the deed of the defendants was executed under powers of attorney, each of which provided that Anson Gage should "make, execute, acknowledge, and deliver good and sufficient deeds and convey-

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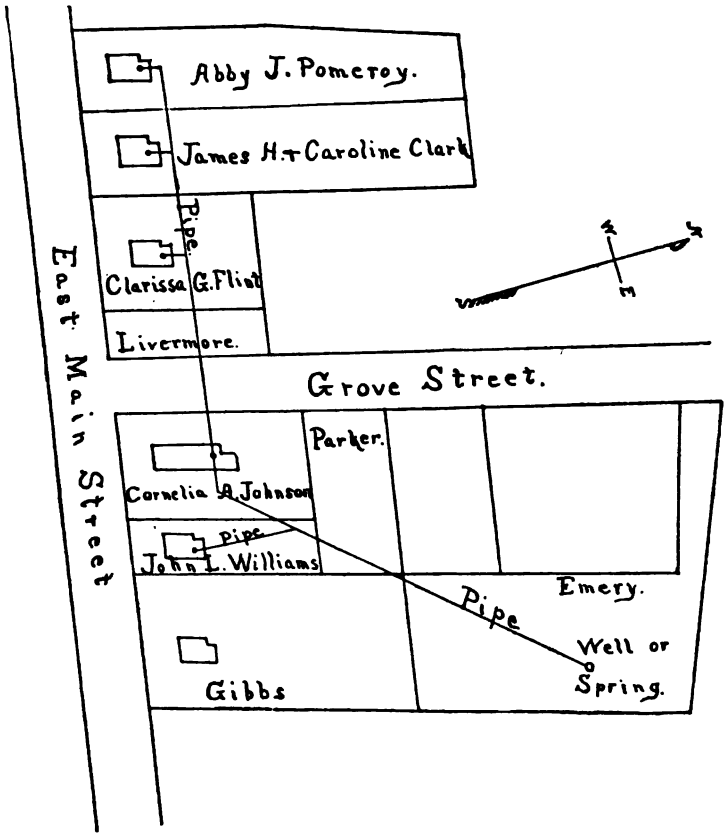
ances of the same, either with or without covenants of warranty, giving and granting to our said attorney full power and authority to do all acts necessary and proper to be done in the premises, in as full and ample a manner as we might or could do if personally present."

The various lots were shown on a plan used at the trial, a copy of which is here printed.



The cases were tried together in the Superior Court, without a jury, before *Brigham*, C. J., who ruled that on the facts found by him the actions could not be maintained, and found for the defendants; and the plaintiff alleged exceptions. The facts appear in the opinion.

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S. D. Conant (*C. C. Conant* with him), for the plaintiff.

A. De Wolf, for the defendants.

W. ALLEN, J. This is an action on the covenant against incumbrances in deeds of land from the defendants to the plaintiff. The declarations allege a right in each of the owners of four dwelling-houses to take and carry water to his house from and through the land by means of pipes, and to enter upon the land to repair the pipes. When the deed was given, an aqueduct or pipe led from a well or spring on the Emory lot through what was called the Williams lot to the land conveyed to the plaintiff, and through and beyond that through the Flint lot and the Clark lot to the dwelling-house upon the Pomeroy lot, and supplied water from the spring to the dwelling-house upon each of the lots. The plaintiff claims that the owners of the Flint, Clark, and Pomeroy lots have severally a right to maintain a pipe on the plaintiff's land, and by it to take water from the plaintiff's pipe. If this right existed as to any of the lots, there was a breach of the covenant against incumbrances.

The right of the owner of the Williams lot was to take water from the aqueduct on his own land before it reached the plaintiff's land. There was no right to enter upon the plaintiff's land, or to take water from it. This right, which pertained to the Williams lot, could not be or work a breach of any covenant in the plaintiff's deed, unless that deed purported to convey to the plaintiff a right in the aqueduct or the water inconsistent with the right appurtenant to the Williams lot. This right had been exercised as appurtenant to that lot since 1863, and was so used at the time of the deed to the plaintiff in 1880. Of course the right to take the same water could not pass as appurtenant to the plaintiff's land, and the fact that it did not pass could not be a breach of any covenant in the deed to the plaintiff. But this is not all; in 1871, Levi Gage owned both the plaintiff's lot and the Williams lot, and conveyed the Williams lot to the present owner with the right of drawing water from the aqueduct, and "reserved the privilege of conveying water across the northwest corner of the premises, as now conveyed." The conveyance from the heirs of Gage to the plaintiff "includes the same privilege of drawing water and conveying the same through land of said Williams as enjoyed by said Levi Gage in his lifetime," thus

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necessarily excluding from the grant the right appurtenant to the Williams lot.

In 1830, William Brooks, under whom the plaintiff claims, bought of Emory the right of carrying water from a well on Emory's land, by logs or pipes, through Emory's land to Brooks's house. In 1837, Brooks, by an instrument under seal but never recorded, granted to French and Town, their heirs and assigns, the privilege of drawing and conveying water in pipes or logs from Brooks's aqueduct "(situated under his horse shed) to the dwelling-house and barn of Richard French, or to any other person or place." This was the aqueduct which Brooks was using under his grant from Emory. French and Town then owned the Clark and Pomeroy lots, and immediately after the grant to them the pipe was extended to the Pomeroy lot, and water has flowed in it to the dwelling-house upon that lot ever since. The pipe crossed the highway from Brooks's land, and through the Livermore lot, the Flint lot, and the Clark lot, to the Pomeroy lot. Water was subsequently taken from the pipe on the Flint lot and the Clark lot to supply dwelling-houses upon those lots. The question is, whether the owner of either of these houses had a right, as against the plaintiff when she had taken her deed, to maintain a pipe on the plaintiff's land, or to have water flow through it, so as to constitute an easement in the land and an incumbrance upon the title to it. No such right could exist by reason of the grant from Brooks to French and Town, as that was not recorded, and there is no evidence that the plaintiff, or others through whom her title is derived from Brooks, had notice of it. As to the Flint lot, no claim is made under French and Town.

The plaintiff claims that rights had been acquired by adverse user. The deed to the plaintiff is dated on December 28, 1880, and acknowledged on December 31, 1880. The covenant against incumbrances must have been broken, if at all, when the deed was delivered. Unless there was an existing easement, then there was no incumbrance.

As to the Clark and Flint lots, it does not appear that there was twenty years' use of the water before the deed to the plaintiff. It was first drawn and used on the Clark lot in 1862. In regard to the Flint lot, it is said that water was first drawn from

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the pipe in 1860, and that it has continued to be drawn and used since. If it can be assumed that the water was first drawn from the pipe twenty years before the delivery of the deed, it does not appear that there was an adverse user of it for twenty years. If drawing and using the water with the knowledge of the owners of the Brooks lot, and without asking or receiving their consent, and without any assertion of a claim of right, would show adverse user, it is not stated, and it cannot be inferred from the facts stated, that such use was continued for twenty years before the delivery of the deed. The facts are not sufficient to show an easement in favor of either of those lots, acquired by adverse user.

In regard to the Pomeroy estate, it appeared that water had flowed to it since 1837; but in 1865, one Carpenter, who then owned the plaintiff's land, acquired the title to the Pomeroy lot, and continued to be the owner of both estates until he conveyed to Pomeroy. If an easement in the plaintiff's land had been acquired, it would have been extinguished by the union of the fee of both estates in him. Carpenter, while the owner of both estates, conveyed the dominant estate to Pomeroy by a deed in which no mention is made of the water or the pipe, and the question is whether an easement in the plaintiff's land passed by implied grant in the deed from Carpenter to Pomeroy. The easement claimed is the right to maintain a pipe upon the plaintiff's land, and there to connect with the plaintiff's pipe and to draw from it water which flows to it from the Emory well.

At the time of the deed Carpenter was the absolute owner of both estates, and had all the rights to water from the Emory well which appertained to either estate. When he became the owner of the Pomeroy estate it had been for more than twenty years supplied with water from the Emory well, through pipes which had been maintained upon the plaintiff's land, then owned by Carpenter; and Carpenter continued to supply the house with water in the same manner until he sold to Pomeroy. At that time the pipe extended from the Pomeroy house into the plaintiff's land, and furnished the supply of water for the house. It sufficiently appears that the conveyance was made and the estate was occupied in view of the fact that the Pomeroy house depended for its supply of water upon that which flowed through

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the pipe upon the plaintiff's land, and that the maintenance of the pipe upon that land was reasonably necessary to the enjoyment of the Pomeroy estate; and a grant of the right will be implied. *Grant* v. *Chase*, 17 Mass. 443. *Atkins* v. *Bordman*, 2 Met. 457. *Parker* v. *Bennett*, 11 Allen, 388. *Philbrick* v. *Ewing*, 97 Mass. 133.

It is true that the grant by Emory to William Brooks was limited to the right to take water for the use of the plaintiff's land, and that the right to take water for the use of the Pomeroy house was not appurtenant to the plaintiff's land, and Carpenter, as owner of that land, had no right to grant it, and a grant of it cannot be implied so as to create an easement in the land. But the right to maintain pipes in the land is distinct from the right to take water from the aqueduct on the land, and is a right which Carpenter could have granted without the right to take the water. The right to take the water could be derived only from the owner of the Emory land; the right to maintain the pipes could be derived only from the owner of the plaintiff's land, and a grant of the latter without a grant of the former may be implied. Carpenter as owner of the Pomeroy lot may have had a right to the water from the Emory well by grant or by prescription, or he may have been using the water without right. In any case a grant of all that he owned and was capable of granting in the aqueduct and the water which for thirty years had furnished the water supply of the house which he sold, would be implied.

We think that a grant of the right to maintain the pipe in the plaintiff's land was implied in the deed to Pomeroy. To this extent there was an incumbrance on the land at the time of the deed to the plaintiff.

The powers of attorney to Anson Gage, under which the deed from the defendants in the action against Knapp and others was executed, authorized the covenant against incumbrances in the deed. *Exceptions sustained.*

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FRANCIS E. HOWES *vs.* DAVID H. NEWCOMB.

Hampden. September 27, 1887. — January 10, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Chattel Mortgage — Lien — Replevin.

A lien under the Pub. Sts. c. 192, § 82, for the board of horses, is maintainable only upon proof that the board was furnished with the consent of the owner; and a mortgagee of the horses, not the mortgagor, is such an owner.

A mortgagor of horses in his possession for use in his business cannot, by keeping them at the barn of an employee, who furnishes feed for them, create a lien as against the mortgagee.

REPLEVIN of horses and other personal property. Writ dated November 6, 1886. Trial in the Superior Court, without a jury, before *Staples*, J., who allowed a bill of exceptions in substance as follows:

It appeared in evidence that one Thompson, on April 26, 1886, mortgaged certain personal property to the plaintiff, consisting of the stock, tools, and fixtures in his meat, fish, and vegetable market, in Springfield, and the two horses, one wagon, three single harnesses, and one business sleigh, described in the writ. The mortgage, which was put in evidence, described the property named in the writ as "used in connection with said business," and provided that on default the mortgagee might sell the mortgaged property, and out of the proceeds "discharge any claims or liens of third persons affecting the same." The plaintiff relied on said mortgage as entitling him to the possession of the property. It appeared that the mortgage was given to secure the payment of a promissory note, given by Thompson to the plaintiff, of even date with the mortgage, for the sum of $325 and interest, and for other purposes, as set forth therein. The note and mortgage were dated April 26, 1886, and the mortgage was duly recorded on April 27, 1886. Thompson, from the date of said mortgage to about October 12, 1886, carried on the business of buying and selling meats, fish, and vegetables, and the horses in question were used in the delivery of goods in the business.

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The defendant was in the employ of Thompson in the market, as a salesman, also peddling fish, and keeping books during the whole time. The horses were kept at the defendant's barn, about one and a half miles from the market, during the whole time, and were there when the mortgage was made, although it did not appear that the plaintiff then, or afterwards, prior to Thompson's disappearance, knew where they were kept. The defendant furnished the grain and hay eaten by the horses during the whole time, and claimed that Thompson owed him therefor the sum of about $30. It appeared that the defendant and Thompson had a settlement on May 8, 1886, when the defendant was paid for keeping the horses to that date; and it is for the keeping after that date that the defendant claims a lien. Thompson absconded on or about October 12, 1886, and has never returned. Before he left, he put all the property described in the writ into the custody and care of the defendant, and directed him to notify the plaintiff of his leaving, which he did. Evidence was offered tending to show a detention of the horses by the defendant prior to November 6, 1886, the same being detained by the defendant on the ground that he had a lien thereon for the expense incurred by him in keeping them. It did not appear that the defendant had taken any steps provided in the statutes towards the enforcement of his lien, except as herein set forth.

The defendant asked the judge to rule, that he had a lien upon the horses for their keeping, as against the plaintiff's mortgage, both for the time intervening between the first interview, on October 12, 1886, and the date of plaintiff's writ, November 6, 1886, and also for the whole time he kept them for said Thompson.

The judge declined so to rule, and found for the plaintiff as respects the horses; and the defendant alleged exceptions.

A. M. Copeland, for the defendant.

W. B. Stone, for the plaintiff.

KNOWLTON, J. The horses sought to be replevied are claimed by the plaintiff under a mortgage of unquestioned validity, and by the defendant under an alleged lien for their board, founded on the Pub. Sts. c. 192, § 32. This section provides that "persons having proper charges due them for pasturing, boarding, or keeping horses or other domestic animals brought to their premises

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or placed in their care by or with the consent of the owners thereof, shall have a lien on such horses or other domestic animals for such charges." It creates rights in derogation of the common law, and is to be construed strictly. *Rogers* v. *Currier*, 13 Gray, 129. To maintain a lien under it, one must show that he has pastured, boarded, or kept the animals claimed, and that they were brought to his premises or placed in his care by or with the consent of their owner. These are matters of fact to be established by evidence.

The only exception taken was to the refusal to rule as requested, that the defendant "had a lien upon the horses for their keeping, as against the plaintiff's mortgage, both for the time intervening between the first interview, on October 12, 1886, and the date of the plaintiff's writ, November 6, 1886, and also for the whole time he kept them for said Thompson"; and the question is, whether the case shows such facts that the judge ought to have made this ruling as a matter of law.

The bill of exceptions does not purport to be a full report of the evidence or facts of the case. It does not even state that it presents all the facts or evidence bearing upon the legal question raised. If we assume, what in a case of this kind, in the absence of an express statement, should not ordinarily be assumed in favor of an excepting party, that we have all the facts touching the existence of the lien claimed, can there be no proper interpretation of them other than as creating a lien? The defendant was bound to prove that the horses were brought to his premises or put in his care by or with the consent of the owner. This fact is not found. Are the others which appear in the exceptions equivalent to it in law? Is it impossible properly to draw inferences from the others inconsistent with the existence of this?

The mortgagor was not the owner within the meaning of this statute, but the plaintiff was. It is not contended that the plaintiff expressly agreed to the horses being placed in the defendant's care. But undoubtedly an implied consent will answer the requirements of the law, and in every case of this kind the inquiry is whether such implied consent is proved. That depends, where animals are left with a mortgagor by a mortgagee, not only upon the terms of the express contract in relation to them, but also upon

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all the circumstances surrounding the transaction, indicating the expectation of the mortgagee as to the management of them by the mortgagor. If from these the mortgagee may be presumed to have understood that the mortgagor would take them to a stable-keeper to be boarded, and no objection was made, such consent should be implied, otherwise it should not. It should be kept in mind that the purpose of a mortgage is to furnish security, and that the property is usually left with the mortgagor for his convenience, with an understanding that nothing shall be done or permitted by him to impair the security. An agreement which will defeat the purpose of the transaction should not be inferred or implied against a mortgagee without cogent evidence. A mortgage of horses, given to secure performance of an act in the distant future, is worthless, if the mortgagor may create a lien upon them by putting them out to be boarded. It is true that the mortgagee must know they are to be fed, and that it will cost something to feed them. But that in itself is immaterial. The real question is, whether he has reason to believe, and does believe, that they are to be boarded at a livery stable, or kept by any one else than the mortgagor.

It is doubtless true that, outside of the largest cities, a very small part of the horses or cattle in Massachusetts are boarded out by their owners. Keeping them in the personal care of the owner or of his servants, upon his own premises, or in barns where he hires privileges and furnishes his own fodder, is the rule. And one acquiring an interest in horses used in a common kind of business in the interior of the State, and leaving them with their owner, would naturally suppose, in the absence of any agreement to the contrary, that they were to be kept by him, and not taken elsewhere to be boarded. If, on the other hand, he should know at the time of taking a mortgage that the mortgagor kept his horses at a boarding stable, or that he was engaged in a business in which men generally hire their horses boarded, and he should leave them with him without directions, he would be held to consent to their being so kept.

The question before us differs from that raised in *Hammond* v. *Danielson*, 126 Mass. 294. In that case the mortgage was upon a hack, which the mortgagee left in the possession of the mortgagor to be used in his business, and the question was whether

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consent was to be implied that it should be taken to a mechanic for repairs in the ordinary way, so as to become subject to a lien. The use agreed to naturally caused wear, and a consequent necessity for repairs; and inasmuch as these repairs could hardly be procured otherwise than by putting it in the shop of a mechanic, the court held that it must be deemed to have been taken there with the mortgagee's consent. Not merely the making of repairs was necessary to the preservation of it, in the use to which the mortgagee permitted it to be put, but the making of them by a person other than the mortgagor, under such circumstances as would ordinarily create a lien at the common law. The keeping of mortgaged horses is necessary to the preservation of the security, but it may be, and commonly is, done by the person who uses them in his business, and it seldom necessitates their being taken away, or put in the custody of another.

The case at bar is like *Storms* v. *Smith*, 137 Mass. 201. In that case, as in this, the effort was to establish a lien for keeping property, and the question was whether the mortgagee impliedly consented to the storage of it for pay by one to whom the mortgagor delivered it. In that case, as in this, the mortgagor might keep it in his personal charge in a building which he owned, or procured for that purpose, or he might put it into the custody of another. It was decided that the mortgagee could not be presumed to have consented to its being left by the mortgagor for storage with one who was to keep it for pay and claim a lien upon it. It is said in the opinion, "The mortgagee had given no authority other than what was to be implied from his allowing the mortgagor to remain in possession of the mortgaged goods, coupled with the fact that it was necessary that the goods should be stored somewhere to prevent their destruction. If these circumstances were enough to support the defendant's claim, every mortgagor in possession of perishable goods would have power to create a paramount lien upon them." And, referring to the record of the mortgage, it is said of the claimant, "If storage was necessary, he was chargeable with notice that the plaintiff had a right to judge for himself where it should be, if his interest was to be charged with the cost."

A charge for keeping goods is the same in kind as a charge for keeping living animals. Each is for the use of the place

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occupied by the property, and for care and supervision. The only difference is, that, from the nature of the property, care and supervision of animals involves feeding them, and is on that account more costly. Perhaps this is a reason why consent to it, as a charge upon mortgaged property, should less readily be implied against a mortgagee.

In the case at bar, no fact appears bearing upon the question of implied consent of the plaintiff to the mortgagor's hiring the horses boarded, except his taking a mortgage to secure payment of a note of three hundred and twenty-five dollars upon the horses and other articles used in the business of the mortgagor as a buyer and seller of meats, fish, and vegetables, and his leaving the property in the mortgagor's possession. It did not appear that "when the mortgage was made, ... or afterwards prior to Thompson's disappearance, he knew where the horses were kept." And knowledge that they were kept in the defendant's barn would not, upon the facts stated, have shown that he was boarding or keeping them, within the meaning of the law. The defendant does not appear to have been engaged in the business of boarding horses. He "was in the employ of Thompson in the market as a salesman, also peddling fish, and keeping books during the whole time." The horses were kept at his "barn, about one and a half miles from the market," and he "furnished the grain and hay eaten" by them. "Thompson absconded on or about October 12, 1886," and "before he left he put all the property described in the writ into the custody and care of the defendant." We have assumed that the defendant had the horses in his "custody and care" as a keeper for hire before that date, and that he did not merely sell Thompson hay and grain and let him room in the barn. But if this was so, there is nothing to show that it was apparent at the time, and it is not clearly stated in the bill of exceptions. The provision in the power of sale authorizing the mortgagee to discharge from the proceeds "any claim or lien of a third person affecting the property" before rendering the surplus to the mortgagor, has little significance as affecting this particular claim of lien; first, because it was a general clause inserted in the mortgage to cover any state of facts that might arise; and secondly, because in this mortgage a great variety of property was conveyed, and, among

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other things, wagons used in the business, which might need to be taken to a shop for repairs.

Putting upon all the facts the interpretation most favorable to the defendant, we cannot say that Thompson had the implied consent of the plaintiff to subject the horses to a lien, or that the judge should have ruled, as matter of law, that the defence was made out. If this were to be held a valid lien, it would seem to follow that every one taking a mortgage upon horses used in a business like that of a provision dealer, and leaving them with the mortgagor, must be deemed impliedly to consent to an arrangement for the destruction of his security. Such a result would be inconsistent with the liberal policy of our law in relation to mortgages of personal property.

Exceptions overruled.

GILBERT AND BARKER MANUFACTURING COMPANY *vs.* BAZALDA BUTLER.

Hampden. September 28, 1887. — January 10, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & KNOWLTON, JJ.

Contract — Part Performance — Work and Materials.

One who agrees to put in a gas machine for a certain sum, and is prevented from completing his contract before the destruction of the building solely by the failure of the owner to do carpenter work as agreed, can recover for work done and materials furnished.

CONTRACT for work done and materials furnished. Trial in the Superior Court, without a jury, before *Dewey*, J., who found for the plaintiff, and the defendant alleged exceptions. The facts appear in the opinion.

C. L. Gardner, for the defendant.

G. Wells, for the plaintiff.

W. ALLEN, J. The plaintiff made a contract with the defendant to furnish certain fixtures and appliances in and about a building that the defendant was to have erected, for which the defendant agreed to pay a specific sum. The plaintiff performed

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its contract only in part, and this action is not upon the contract, but in general assumpsit for labor and materials furnished in such part performance. If it appears that the non-performance of the contract by the plaintiff was caused by the fault of the defendant, and that without the fault of the plaintiff the contract has been rescinded or put an end to, so that nothing more can be done under it, and no action will lie upon it, this action can be maintained.

The contract provided for furnishing the machinery and appliances for supplying a hotel, and a barn and bowling-alley near it, with gas. The plaintiff was to furnish and put in place an air-pump, a mixing regulator, a tank or gas-generator, and pipes and fittings to distribute the gas about the buildings; the defendant was to do all the earth-work, mason-work, and carpenter-work that was required. So far as the work to be done by the defendant was a condition precedent to work to be done by the plaintiff, the contract implied that the defendant should have it seasonably done, so as not to delay the plaintiff after it had been notified that the buildings were ready and had commenced work under the contract.

The plaintiff had put the holder or gas-generator into the defendant's land, and the pipes in the hotel and in the barn and bowling-alley, and the air-pump and mixing regulator in the cellar of the hotel, and had completed everything required of it by the contract except filling the weight case and attaching the pulleys and cords by which the air-pump was worked. The case, pulleys, and cords were provided, and everything was finished in accordance with the contract except filling and hanging the weight case. The plaintiff was prevented from doing that, and from completing the work under the contract, by the neglect of the defendant to furnish the frame to which the case was to be hung. Not only was the frame not ready, but the defendant was not then prepared to build it. The plaintiff left the work unfinished solely because the breach by the defendant of his contract to furnish the carpenter-work made it impossible for the plaintiff to finish its work at that time. The plaintiff did not rescind the contract, if it had the right to do so. The work was substantially all done. The hotel was not completed. When it should be completed, the plaintiff would have occasion — though

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it was not required by the contract — to send a man to the premises to start up the machinery, and the same man could attend to filling and hanging the weight box, and attaching the cords and pulleys. The plaintiff intended to do this, and it was understood by both parties that it would be done. The hotel was destroyed by fire before it was finished, and before the plaintiff had notice that the frame was ready. The destruction of the building without the fault of either party absolved both parties from the obligation of the contract, and rendered further performance of it by the plaintiff impossible; it worked a virtual dissolution of the contract.

It is hardly necessary to cite authorities or adduce arguments to sustain the proposition, that, if the plaintiff had furnished labor and materials under an entire contract, which it had not fully performed at the time the contract was dissolved, and if such non-performance was owing to the fault of the defendant, the plaintiff can maintain an action for the labor and materials. *Rawson* v. *Clark*, 70 Ill. 656, and *Garretty* v. *Brazell*, 84 Iowa, 100, are in point.

There is no question that the fault of the defendant prevented the completion of the plaintiff's work at some time before the fire, and it must be taken to have been the cause of the non-completion of the work at the time of the fire, unless some fault of the plaintiff intervened as a contributing cause. The plaintiff could not be in fault unless he was under obligation to perform the contract, and had an opportunity to complete the work. If the breach of contract by the defendant was such as to give the plaintiff a right to rescind the contract, and he exercised that right, he would be under no obligation further to perform the contract, and could not be in fault in not doing so. If the circumstances were such that he could not, or if he did not, rescind the contract, but continued under its obligation, the fact would remain that he would have fully performed the contract but for the fault of the defendant, and that fault would remain the cause of the non-performance until the plaintiff should be in fault. The plaintiff could be in no fault in not completing the work until it had notice that the defendant had finished the frame. Although the frame was in fact ready two months before the hotel was burned, the plaintiff had no notice of it. It had no reason to

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suppose that the defendant had rendered it possible to finish the work, and we need not consider what would have been the effect of notice from the defendant before that time, that he had performed the condition precedent, with a request to the plaintiff to complete the work.

The plaintiff was not in fault in not insisting upon a speedy performance of the contract by the defendant, and in agreeing to a postponement. The defendant had already broken his contract, and prevented the plaintiff from completing its part, and obliged it to suspend its work, and it could not perform the little that remained until the defendant had performed his part. At what time that should be done was immaterial. It might be more desirable and convenient for both parties that it should not be done until the building was finished, so that the machine could be put in use. The defendant's work was a condition precedent to the plaintiff's, and if they mutually agreed that both should be postponed for a time their relations were not changed, nor was the fact altered that the failure of the defendant to finish his work prevented the plaintiff from performing its contract.

Without deciding, that, if there had been no fault in either party, the destruction of the building before the plaintiff had fully performed its contract would give it a right to recover for what it had furnished under it, (see *Lord* v. *Wheeler*, 1 Gray, 282; *Cleary* v. *Sohier*, 120 Mass. 210; *Wells* v. *Calnan*, 107 Mass. 514; *Appleby* v. *Myers*, L. R. 2 C. P. 651,) we decide that, as the plaintiff had been prevented from performing its contract by the fault of the defendant, and as, without the fault of the plaintiff, the contract remained unperformed at the time it was dissolved by the burning of the building, the plaintiff can recover for the labor and materials furnished under the contract, although the completion of the work had been further delayed by the consent of both parties, and without the immediate fault of either. *Exceptions overruled.*

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EMERY KNOWLTON & another *vs.* JAMES KEENAN & others.

Worcester. October 3, 1887. — January 10, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Representation — Contract — Extrinsic Evidence.

A representation as an inducement to a contract that something shall thereafter be done, is not a representation such as will render the maker liable, but, if anything, amounts to a distinct agreement.

A contractor to carry the United States mails sublet the contract by an agreement in writing, by the terms of which the mails were to be carried according to a certain schedule. In an action for breach of contract, the sub-contractor offered evidence that the contractor at the execution of the agreement fraudulently promised to secure thereafter a change in the schedule. *Held*, that the evidence was inadmissible as varying the terms of a written contract.

CONTRACT upon an agreement in writing, dated June 22, 1885, entered into between the plaintiffs and the defendants, to transport the United States mails between Mashpee and Sandwich.

At the trial in the Superior Court, before *Pitman*, J., without a jury, it appeared that the plaintiffs were contractors with the United States for transporting the mails between these towns, and had authority to sublet the contract.

The agreement provided that the defendants should transport the mails from Mashpee to Sandwich and back six times a week from July 1, 1885, to June 30, 1889, inclusive, on such schedule as the Postmaster General might direct. There was a schedule annexed to the agreement, which provided for leaving Mashpee daily, except Sundays, at 5 o'clock A. M., and arriving at Sandwich at 7.30 o'clock A. M., and leaving Sandwich at 11 o'clock A. M. and arriving at Mashpee at 1.30 o'clock P. M. The defendants lived and did business at Sandwich, and the defendant Keenan testified that he could not perform the contract without pecuniary loss, unless the schedule time for carrying the mails should be changed so that he could carry the mails from Sandwich to Mashpee and return each day so as to allow him to live and do business at Sandwich. The plaintiffs produced evidence tending to show that the defendant Keenan refused to carry the mails as provided in the schedule annexed

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to the agreement, and that the plaintiffs, on or about July 10, 1885, sublet the contract to other parties at an advance of forty dollars a year above the price stated in the agreement with the defendants.

The defendant Keenan offered evidence tending to show that the plaintiffs, at and before the execution of the agreement, fraudulently promised the defendants that, if they would execute the agreement, the plaintiffs would secure a change in the schedule time of carrying the mails, so that he could carry the same from Sandwich to Mashpee and return, and fraudulently represented to him that the plaintiffs could easily secure such a change in the schedule time from the Postmaster General; that the defendants, relying upon such promise and statement, signed and executed the agreement; and that the plaintiffs did not secure such a change in the schedule, and made no effort to do so, and that the plaintiffs knew, at the time that they made the statement, that they could not secure such a change in the schedule.

The judge rejected the offer of evidence, and found for the plaintiffs; and the defendants alleged exceptions.

J. W. Corcoran, for the defendants.

S. L. Graves, for the plaintiffs.

DEVENS, J. The plaintiffs, who were themselves contractors with the United States to carry the mails, having authority to sublet their contract, made a written contract with the defendants to carry the mails from Mashpee to Sandwich and back, according to a certain schedule. As an excuse for the nonperformance of their contract they offered evidence that, at and before the execution of this contract, the plaintiffs fraudulently promised to procure a change in the schedule, and fraudulently represented that they could secure such a change; and that they knew at the time that they could not, and that they thereafter did not do so. The fraud which the defendants sought to establish was the failure to perform an oral promise contemporaneous with the written agreement, and constituting a part of the transaction, which the plaintiffs knew they could not perform.

The case at bar is readily distinguishable from those cases where it has been held that, if a person makes a representation of a fact as of his own knowledge in a matter susceptible of

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knowledge, and such representation is not true, or where in a matter of opinion, judgment, or estimate dishonestly and with the intent to deceive states that as of his own knowledge which is not true, and the party to whom the statement is made relies and acts upon it as true, and thus sustains damage, it is a fraud and deceit for which the party making it is responsible. *Tryan* v. *Whitmarsh*, 1 Met. 1. *Page* v. *Bent*, 2 Met. 371. *Milliken* v. *Thorndike*, 103 Mass. 382. *Munde* v. *Lambie*, 122 Mass. 336.

That which the defendant sought to prove, if it can with propriety be termed a representation at all, was a representation that something should thereafter be done. Such a representation from its nature could not be true or false at the time it was made, and, if anything, was a contract or promise. The difference between a representation that something exists which does not, and a representation that something shall be done thereafter, is obvious. *Beattie* v. *Lord Ebury*, L. R. 7 Ch. 777, 804. A representation which amounts to an engagement, if enforceable, must be so as amounting to a contract. "There is no middle term, no *tertium quid*," says Lord Cranworth, "between a representation so made to be effective for such a purpose and being effective for it, and a contract." *Maunsell* v. *White*, 4 H. L. C. 1039, 1056.

What the defendants sought to establish by their evidence was an oral contract, by which the terms of the written contract were to be changed by the efforts of the plaintiffs, and the mails which the defendants had in writing agreed to transport according to a specified schedule were to be transported according to a different schedule, to be obtained from the Postmaster General. The principle that written contracts are not to be enlarged, added to, or controlled by previous or contemporaneous oral agreements is too well settled to require a citation of authorities. Proof of such a representation as that offered by the defendants was proof only of an oral contract to be thereafter executed. Nor even if the plaintiffs made this oral contract fraudulently, knowing they could not perform it, would that have rendered the evidence admissible. There was no fraud in the written contract itself, and such evidence could not have been received to control its operation, and virtually to annul it.

Exceptions overruled.

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GEORGE EVERETT *vs.* EDWIN P. HENDERSON & another.

Suffolk. November 10, 1887. — January 10, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Arrest on Execution — Affidavit — Recognizance — Malicious Prosecution.

The legality of an arrest on execution made in due form, and the validity of a recognizance thereupon entered into, cannot, in an action on the recognizance, be questioned as founded on a false affidavit; but the only remedy is by an action for malicious prosecution.

In an action on a recognizance entered into by a poor debtor under the Pub. Sts. c. 162, § 28, upon his arrest in due form, the defence that the affidavit of the creditor was wilfully false, and that the certificate of the magistrate thereon was got by fraud and perjury, is not open, and will not avoid the recognizance.

CONTRACT on a poor debtor's recognizance, entered into by the first-named defendant as principal, and by the other defendant as surety, and containing the usual conditions.

At the trial in the Superior Court, before *Mason*, J., it appeared that the plaintiff duly recovered judgment against Henderson in the Municipal Court of the city of Boston, on May 29, 1884, and that execution duly issued on the judgment, but was returned in no part satisfied, and without service. On September 3, 1884, an alias execution on the judgment duly issued, and on September 8, 1884, the plaintiff made an affidavit, in due form of law, before Edward J. Jones, a master in chancery, that he believed, and had good reasons to believe, that Henderson "has property not exempt from being taken on execution, which he does not intend to apply to the payment" of the claim; and that Henderson "contracted the debt with an intention not to pay the same." Thereupon Jones, upon an *ex parte* hearing, granted a certificate "that, after due hearing, I am satisfied there is reasonable cause to believe that the charge made in the said affidavit is true; and satisfactory cause having been shown, I hereby authorize the arrest of the said debtor on the annexed execution"; and annexed the affidavit and certificate to the alias execution.

On November 1, 1884, Henderson was arrested in Boston by an officer duly qualified to make the arrest and serve the execu-

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tion, and carried before Edward J. Jenkins, a commissioner of insolvency, before whom he gave the recognizance.

On November 24, 1884, Henderson duly gave notice of his intention to take the oath for the relief of poor debtors, before Henry W. Bragg, a master in chancery, and several hearings were had. On March 7, 1885, pending the examination, the plaintiff duly filed before Bragg charges of fraud, among which was the one sworn to in the affidavit, and hearings were had on such charges. The hearings on the charges of fraud were continued from time to time, and finally to April 18, 1885, at one P. M., at which time the plaintiff and Henderson appeared and remained during the whole hour, and after the lapse of the hour the plaintiff, before the appearance of the magistrate, departed. The magistrate, Bragg, was not in attendance within the hour, and did not appear and attend until a quarter past two o'clock, nor did any other magistrate attend in his place, and there were no further adjournments or proceedings had.

The defendants contended that the affidavit was made by the plaintiff falsely, fraudulently, and without probable cause, and that the plaintiff did not, at the time he made it, believe or have good reason to believe the affidavit to be true. The plaintiff, before any evidence was offered by the defendants, asked the judge to rule that no evidence could be offered or introduced in this action to control or affect the affidavit, or to show that the affidavit was false, fraudulent, or made without probable cause, or that the plaintiff did not believe, or had no good reason to believe, that the affidavit was true; but the judge refused so to rule, and admitted evidence to show that the affidavit was false and fraudulent, and made without probable cause, and that the plaintiff did not believe, and had no good reason to believe, the affidavit to be true at the time of making.

The judge instructed the jury, that the burden of proof was upon the defendants to establish the defence of fraud, and it must be proved affirmatively; that it was not sufficient to show that Henderson intended to pay the debt when he contracted it, nor that the plaintiff when he made the affidavit had no good reason to believe that Henderson did not intend to pay the debt when he contracted it; that, while it was necessary for the defendants to prove both these propositions, they must go further,

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and prove that the plaintiff did not believe the affidavit when he made it, and that it was in fact a corrupt affidavit; that if the defendants proved all this, and that the magistrate's certificate authorizing the arrest was obtained by the fraud and perjury of the plaintiff, the plaintiff could not avail himself of the arrest thus obtained as the foundation of his cause of action, but as between the plaintiff and these defendants the arrest and recognizance would be void, and their verdict should be for the defendants; but that if the defendants had not sustained the burden of proof, and established wilful fraud and perjury on the part of the plaintiff, their verdict should be for the plaintiff in the penal sum named in the recognizance.

The jury found for the defendants; and the plaintiff alleged exceptions.

E. M. Bigelow, for the plaintiff.

C. G. Keyes, for the defendants.

KNOWLTON, J. The defendants contend that the recognizance declared on cannot be enforced, because the proceedings in which it was taken were founded upon a wilfully false affidavit of the plaintiff. The act imputed to the plaintiff involves such moral turpitude, that we cannot permit him even temporarily to profit by it, unless upon principle as well as authority our duty is clear.

The wrong complained of, so far as it affects the question before us, was like an ordinary malicious prosecution of a groundless suit. The proceedings for the arrest of the defendant Henderson were in the nature of a new prosecution. They were for the purpose of obtaining a remedy which was not available without them. The statute provides that they "shall be considered in the nature of a suit at law." Pub. Sts. c. 162, § 49. They were founded upon allegations of fact, heard at first *ex parte*, which, if issue was taken upon the arrest, were afterward to be regularly tried between the parties, with a view to an adjudication which should give or withhold the remedy sought. It is admitted that the affidavit was proper in form and substance, that the magistrate had jurisdiction to act upon it, and that he judicially found the facts alleged in it to be true, and signed a certificate authorizing the arrest. The arrest was regularly made by a proper officer, and the defendant Henderson was taken

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before a magistrate, and there entered into the recognizance in suit. The proceedings being conceded to have been in all other respects legal and proper, it is contended that the known falsity of the plaintiff's allegations in his affidavit rendered the arrest, as to him, illegal, and the recognizance void.

It is familiar law that an officer called upon to serve a process needs only to see that it is good upon its face, and it is not suggested that the conduct of the officer or of the magistrate in relation to this arrest can be called in question. But there are cases in which an officer is protected in making an arrest, when the person who caused it or set the proceedings in motion is liable. If the arrest in this case was legal as to the plaintiff as well as the officer, the recognizance founded upon it was legal also, and can be enforced in this action. If it was illegal as to the plaintiff, he can be sued in trespass for causing it, the process as to him is no justification, and the recognizance is tainted with illegality and is void. We are brought, therefore, to the inquiry, Under what circumstances is an arrest under process illegal, as to the party causing it to be made?

There is no doubt that one who obtains a process and causes it to be served assumes the duty of seeing that it is well founded. He should know that it rests upon a good record, or other proper preliminary proceeding; but so far as the matter depends upon an adjudication by a court or magistrate having jurisdiction, he may rely upon that. Processes good on their face may be absolutely void for want of jurisdiction in the court or magistrate that issues them, or they may be voidable for error, or they may be voidable for irregularity in obtaining them. Processes voidable for error do not subject the person who directs their use to any liability, even after they are set aside. But processes irregularly obtained may be set aside, and then, as against those who obtained them, acts done under them are deemed to have been done illegally. *Cassier* v. *Fales*, 139 Mass. 461. *McGregor* v. *Crane*, 98 Mass. 530. *Barker* v. *Braham*, 3 Wils. 368. *Tarlton* v. *Fisher*, 2 Doug. 672. *Belt* v. *Broadbent*, 3 T. R. 183. *Bates* v. *Pilling*, 6 B. & C. 38. *West* v. *Smallwood*, 3 M. & W. 418. *Collett* v. *Foster*, 2 H. & N. 356, 361. *Chapman* v. *Dyett*, 11 Wend. 31. *Deyo* v. *Van Valkenburgh*, 5 Hill, (N. Y.) 242. *Lovier* v. *Gilpin*, 6 Dana, 321.

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In cases of error, the judicial action in which the error is found is a justification for all who have acted in reliance upon it. In *Marks* v. *Townsend*, 97 N. Y. 590, where a process for arrest was set aside for error, it was held that the person who obtained it was not liable, and it was said in the opinion, that if he had known facts which made the arrest improper, and, concealing them, had maliciously made the affidavit and caused the arrest, he would not have been liable for false imprisonment, but only for malicious prosecution. The affidavit seems to have been of matters other than those to be tried in the proceeding then instituted, and against this dictum there are conflicting dicta in other cases. Some judges have intimated that action like that supposed would constitute irregularity, for which the process might be set aside even if there was error also, and that the affiant would then be liable in trespass for false imprisonment. *Williams* v. *Smith*, 14 C. B. (N. S.) 596. *Smith* v. *Sydney*, L. R. 5 Q. B. 203. *Daniels* v. *Fielding*, 16 M. & W. 200.

The cases of irregularity cover a variety of defects in the record, or in other preliminary proceedings. Irregularities do not result from wrong adjudications, and in that respect they differ from errors. But irregularities, whether we include in the term those fundamental defects which go to the jurisdiction and render the process void, or limit it by a stricter definition which will comprise only those upon which the proceedings may be set aside, do not include false allegations of fact, made as a foundation for a suit in which the allegations are to be proved or disproved. And this is equally true whether they are falsely made by mistake or by design.

The remedy for causing an arrest by maliciously bringing a suit upon false charges, or maliciously making a false affidavit, is by an action on the case for a malicious prosecution. *Legallee* v. *Blaisdell*, 134 Mass. 473. *Luce* v. *Dexter*, 135 Mass. 23. *Baron* v. *Sleigh*, 2 Cro. Eliz. 628. *Daniels* v. *Fielding*, 16 M. & W. 200, 207. *De Medina* v. *Grove*, 10 Q. B. 152, 170. *Sheldon* v. *Carpenter*, 4 N. Y. 578. These authorities imply the negative, that an action of trespass for the arrest or for false imprisonment will not lie. And this point has been directly adjudicated. *Coupal* v. *Ward*, 106 Mass. 289. *Mullen* v. *Brown*, 138 Mass. 114. *Langford* v. *Boston & Albany Railroad*, 144 Mass. 431.

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Wood v. *Graves*, 144 Mass. 365. *Daniels* v. *Fielding*, 16 M. & W. 200. *Barber* v. *Rollinson*, 1 C. & M. 330. In each of the first three of the latter cases the arrest was upon a criminal prosecution, and the complainant did not cause it in the same sense as one causes an arrest who sues out a capias for his own purposes, and gives it to an officer with directions to serve it. One who makes a criminal complaint does not commonly direct the service of the precept, but from the beginning the control of the prosecution is with the officers of the law. In *Wood* v. *Graves*, *ubi supra*, in which the arrest was under a criminal warrant, it was held that the defendants were not liable for false imprisonment on account of abusing the process by procuring it to be issued for an improper purpose, and that the only abuse which would render them liable was an improper use of it after it had been served. In *Cassier* v. *Fales*, 139 Mass. 461, it is said that "it is difficult to see how any person can be guilty of a trespass in serving or causing to be served a valid writ, or other process of a court." *Lovier* v. *Gilpin*, 6 Dana, 321, 328, was an action of trespass against the plaintiff in a civil suit, for causing an attachment of property and assisting the officer in making it. There was an offer to show that the process was maliciously obtained, and in an elaborate opinion, reviewing the cases and holding that the action could not be maintained, Marshall, J., said: "We have found no case in which a party who institutes a groundless proceeding has been held liable as a trespasser for what is done by his direction, or with his aid, in the regular course of that proceeding, unless the process under which the act complained of was done be void, or unless, if voidable only, the process itself, or the proceeding on which it rests, has been set aside or annulled before the action of trespass is brought."

The doctrine that the validity of proceedings in a suit at law cannot be called in question on the ground that it is not well founded in fact, rests upon important considerations of public policy. Every suit involves allegations of fact upon which a claim is founded. If the claim is resisted, the truth or falsity of the allegations is to be ascertained by a trial in the suit itself. The bringing of the suit is an offer on the part of the plaintiff to prove them. All action in the case proceeds upon the theory that the plaintiff is ready to maintain his claim, and that he may

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or may not succeed in establishing it. Every step in the suit is incidental to the purpose for which it is presumed to have been brought, — that of determining whether its allegations are true, and of obtaining a remedy if they are proved. Provisions are made for preserving the rights of both parties. They all recognize that the existence of a just cause of action is in dispute, and is to be regularly inquired into and finally passed upon in the suit itself. Whatever the law prescribes in the course of the proceeding, whether for the security of the plaintiff by way of attachment or arrest, or for the protection of any other interests of either party, may be legally done, and an ultimate decision that the plaintiff was mistaken or wilfully false in the original statement of his cause of action should not render it invalid. And this because there must be incidental acts, oftentimes of great importance and variety, in the litigation of a disputed question; and it is necessary that rights dependent upon these acts should be fixed and stable. Neither the plaintiff, nor any one else connected with the suit, should be called upon by the defendant to try collaterally the questions involved in it.

If, while the suit is pending, it should be attempted to separate the question of the merits of the action from that of the plaintiff's belief in regard to the merits of it, it would be practically impossible to do it. The rule is familiar, that an action for malicious prosecution cannot be maintained until the original suit has first been determined in favor of the original defendant. So long as anything remains open for trial upon the plaintiff's allegations in that, it will be deemed to have been properly brought. When it has been decided in favor of the defendant, he may show, if he can, that it was brought maliciously and without probable cause, and recover damages for the wrong done him.

There is no want of jurisdiction, irregularity, or error to affect any of the proceedings in a suit brought in due form, on a maliciously false statement of a claim. The only questionable element in it relates to that which must be uncertain in every case, the validity of the plaintiff's claim, and his belief in regard to it. When the uncertainty as to which of the parties is right is eliminated at the trial by a verdict for the defendant, or the case is otherwise ended in his favor, and an action for malicious

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prosecution is brought, the former proceedings cannot be set aside, and are not rendered invalid.

In an action for malicious prosecution damages may be recovered for all the injury which resulted directly from bringing the suit, and from the measures regularly adopted in conducting it. It would be an anomaly if one could recover in such an action, and recover also in trespass from the same defendant for an arrest regularly made as a part of the same prosecution; or if an attachment of property, or any other incidental act from which damage resulted, could be made a separate cause of action, on the ground that it was illegal as against the original plaintiff who caused it; — much more if, before the termination of the original suit, one who as receiptor had contracted with an officer to return attached property on demand could answer the officer's suit for the goods by alleging that the attachment was illegal as against the original plaintiff because the suit was maliciously brought; or if the officer himself could make a similar answer to a suit by the plaintiff for negligence in the performance of his duty in relation to an attachment.

If in the case at bar the arrest was not illegal as against the plaintiff, there was no defect in the recognizance. It was for a good consideration, and was entered into in due form, in accordance with the statute, before a magistrate having jurisdiction. Moreover, under our law it became the only security of the plaintiff, and stood in place of the judgment and execution. *Brown* v. *Kendall*, 8 Allen, 209, 210. *Morgan* v. *Curley*, 142 Mass. 107. It was perfect unless tainted with illegality. But the same considerations that show the arrest to have been regular and legal apply to this also. Indeed, this having been entered into voluntarily by the defendants, the only illegality to affect it must be sought for in the arrest which preceded it.

And it cannot be truly said that the reasoning applicable to arrests or attachments upon ordinary suits maliciously brought is inapplicable to this arrest upon execution. For the affidavit was a statement of matters which if true entitled the plaintiff to prosecute and maintain his suit in this way. The charge of fraud was the foundation of the new proceeding. It was a charge upon which the defendant could plead not guilty, and demand a trial, which would determine the ultimate rights of

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the parties. That trial could be had quickly, and the statute contemplated that both parties should proceed regularly in the mode prescribed, to ascertain the truth or falsity of the facts alleged, as they are required to do in any suit at law. The fact that an issue in relation to the pecuniary condition of the defendant was also triable is immaterial. Every reason why arrests and attachments made in suits upon maliciously false declarations should be held legal, can be urged in support of the legality of the arrest in this case.

This case does not fall within the principle of numerous cases in which it is held that one shall not be permitted to take advantage of his own wrong. It is true that an arrest which is accomplished by means of an unlawful act, like breaking a dwelling-house, is void. But in these cases there is illegal action which precedes or accompanies the use of process, and is outside of it, and which leads directly to the arrest, and enters as an element into it. In the case at bar the arrest was not directly caused by an unlawful act. The plaintiff had no connection with it except through the process which he ordered served according to its precept. He made a statement under oath, which showed a proper case for an arrest, and a trial in the manner prescribed by law. The magistrate in a preliminary hearing acted judicially upon it, and gave his certificate of authority. Making a statement in such a case is in itself a lawful act; and a process regularly issued upon it, under which the statement may be further passed upon, is a lawful process. Illegality and fraud taint the statement, but not the process. That is good in law, whether the statement be true or false.

So where unlawful acts have been done in obtaining an attachment of property, like taking possession of it on Sunday, or fraudulently inducing the owner to bring it from a State where it cannot be attached to one where it can, there has been an element of wrong other than in the cause of action upon which the writ was procured. *Parsons* v. *Dickinson*, 11 Pick. 352. *Ilsley* v. *Nichols*, 12 Pick. 270. *Deyo* v. *Jennison*, 10 Allen, 410. In each of the cases cited there was fraud or misconduct in regard to the property before it was taken under the writ, which made it unlawful for the plaintiff to attach it. The writ of replevin referred to in *Pine* v. *Morrison*, 121 Mass. 296, was not between

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the parties to that suit, and did not present for trial the issue presented in that. In *Crocker* v. *Atwood*, 144 Mass. 588, the fraud was not solely in stating a fictitious claim. The attachment of a particular article of personal property does not ordinarily follow from merely suing out a writ of attachment. Besides obtaining the writ, the plaintiff, in the original case to which *Crocker* v. *Atwood* relates, "caused the property to be taken on the attachment," and this he did with a fraudulent purpose to deprive the defendant of his rights in it. The case merely holds that other fraud may be taken advantage of, notwithstanding that there was a malicious prosecution.

A distinction has sometimes been suggested between illegality as a ground for a suit, and illegality which can be availed of in defence against the claim of another. But no such distinction exists in cases like that at bar. If the arrest was illegal as against the plaintiff, it was so as well for the purpose of sustaining a suit against him for his wrong as for defeating an action brought upon the recognizance. In *Ammidon* v. *Smith*, 1 Wheat. 447, it was held that the fraudulent taking of an oath by a person under arrest on a civil process, and the obtaining of a release thereby, did not constitute an escape, nor charge the sureties in a suit upon his bond for the prison limits, even though they participated in the fraud. That too was a case in which the oath taken was not the foundation of proceedings for the purpose of trying the allegations contained therein. See also *Smith* v. *Quinton*, 2 Bray. (Vt.) 200.

If the validity of legal proceedings could be tried collaterally before the termination of the suit, on the ground that a false cause of action was maliciously stated, or that a false affidavit for arrest was maliciously made, a defendant whose property had been taken might sue for an injunction against the attaching officer. A defendant arrested, instead of trying the facts charged in the affidavit, in the manner prescribed by law, might apply for release upon habeas corpus, or, after a trial upon the charges before a magistrate, and at any time before final judgment in the Superior Court, if he saw he was likely to be convicted, he might make default, and set up, as the defendants have done in this case, the falsity of the affidavit in defence to the supplemental suit upon the recognizance. With such a rule there

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could be no regularity in procedure, and no certainty as to the value of any security.

In a case of this kind there is no hardship in leaving a party to existing remedies. He may, first, obtain under the statute an early hearing of the matters alleged against him, and secondly, after the case is ended, he may, if the facts will warrant it, bring his action for a malicious prosecution.

If this remedy is not now available to the defendant, it is because of neglect or misfortune for which he is legally responsible. It was his duty to have a magistrate present to hear or continue the case at the time to which the hearing was adjourned. His neglect of that duty was a breach of his recognizance. Whether, with such a termination of the proceeding, he can now bring a suit for malicious arrest or prosecution is a question which is not before us. In *Fortman* v. *Rottier*, 8 Ohio St. 548, it was held by a majority of the court, that an action for malicious prosecution could be maintained for procuring an attachment upon a false affidavit, without first getting the proceeding set aside. And in *Bump* v. *Betts*, 19 Wend. 421, a similar decision was made, where property was attached and a judgment *in rem* obtained upon a false and malicious affidavit that the defendant had absconded. But in both of these cases it seems that the affidavits were not of matters which were to be tried in the regular course of proceedings instituted by them, and in that respect they differed from that in the case at bar.

Inasmuch as the jury were permitted to find for the defendants upon a defence which was not properly open to them, the entry must be *Exceptions sustained.*

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BOSTON SAFE DEPOSIT AND TRUST COMPANY *vs.* GEORGE MIXTER.

Suffolk. November 15, 1887. — January 10, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Trust and Trustee — Title — Private Sale — Notice.

A testator, after bequeathing to each of his four children the income of a specified sum to be held in trust, gave to them the residue of his estate, real and personal, "to be divided equally between them share and share alike, to them, their heirs and assigns forever." After the marriage of a daughter, the testator by a codicil directed that "all the property and estate so given my said daughter in addition to said income in said will shall be paid" to a trustee, "to be invested" for her benefit, and provided for the disposition of the trust fund by the trustee at her death. *Held*, that the trustee took the legal title to both the real and personal estate, with power to sell and convey.

A notice of a sale of a trust estate under the Pub. Sts. c. 141, § 21, addressed to the "heirs at law, next of kin, and all other persons interested" is sufficient.

A trustee, after the lapse of a year from the granting of a license to sell at private sale, is not obliged by force of the Pub. Sts. c. 142, § 18, cl. 4, to sell by public auction.

CONTRACT to recover the purchase money for an undivided fourth part of real estate, which the plaintiff, as trustee, agreed in writing, on October 29, 1886, to sell and convey to the defendant in fee by a good and sufficient deed. The deed was tendered on November 9, 1886. A decree of the Probate Court authorizing a private sale was made on July 21, 1885, the citation and order of notice upon the plaintiff's petition being addressed "To the heirs at law, next of kin, and all other persons interested in the real estate held in trust."

The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on agreed facts, which appear in the opinion.

J. D. Ball, for the defendant. The plaintiff, as trustee, took only an estate during the life of Fanny L. Howard, and her children or their representatives are to take the remainder if they survive her, the remainder being contingent. The codicil does not provide that at her death the plaintiff shall divide, but that the estate left in trust shall be divided. All the

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purposes of the trust could be accomplished if the trustee took only such life estate. A fee in the trustee was not essential to the execution of the trusts. The usual rule in respect to property given in trust is, that the trustee takes an estate commensurate with the purposes of the trust, and nothing more. Perry on Trusts, § 312. *Smith* v. *Thompson*, 2 Swan, 386. *Doe* v. *Williams*, 2 M. & W. 749, 756, 757. *Curtis* v. *Price*, 12 Ves. 89. *Packard* v. *Marshall*, 138 Mass. 301, 302. *Moore* v. *Stinson*, 144 Mass. 594. *Doe* v. *Considine*, 6 Wall. 458, 469–472.

The statute authorizes the sale and conveyance of the "estate held in trust," when it appears to be necessary or expedient; not a sale of the estate in fee when the trust estate is limited to a life estate, as here. The statute contemplates merely the sale of the trust estate, and if the trust estate is only a life estate, it does not authorize the court to decree a sale and conveyance of the title of the remaindermen.

The statute required notice to be given to "all persons who are or may become interested in such estate, and to all persons whose issue, not then in being, may become so interested." It is clear that the children of Fanny L. Howard living at the time of her death, and the issue then living of any deceased child, would be interested in the estate. If the trustee took a fee before the Probate Court could authorize a sale, it must give the notice required by the statute. The only notice given was a citation addressed to the heirs at law, next of kin, "and all other persons interested in the real estate held in trust, under the will of William Mixter, by the Boston Safe Deposit and Trust Company, trustee for Fanny L. Howard." The provisions of the statute must be strictly pursued. The notice did not substantially conform to the statute.

The Public Statutes, although embracing all the public law in Massachusetts in force at the time when they were passed, are yet to be construed as having been passed *uno flatu*. One provision of the statutes is, that "no sale of real estate made by an executor, administrator, guardian, trustee, or other person by license of court, and no title under such a sale, shall be avoided for the reason that the deed was not delivered within one year after the license, or on account of any irregularity in the proceed-

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ings if it appears . . . . that the premises were sold by public auction in accordance with the notice, and are held by one who purchased them in good faith." Pub. Sts. c. 142, § 18.

Before this provision was enacted, which was in 1864, it seems that a trustee was not in so many words bound to sell, if at private sale, within one year from the date of the decree or license, and, if the trustee sold after the lapse of one year, to sell by public auction. At that time, however, an executor, or administrator, or guardian, could sell only within the year, and could sell then only by public auction. And the Legislature by this provision, probably overlooking the fact that a trustee was not then, in so many words, limited to a sale within a year, or to a sale by public auction, put executors, administrators, guardians, and trustees, in so many words, in the same category, and provided that a sale by neither should be avoided, if made after the lapse of a year, if certain things enumerated had been done. See Gen. Sts. c. 102, § 47; Sts. 1860, c. 60, § 1; 1864, c. 137, § 1.

And it results from this provision, that, if the sale by either was after the lapse of a year, and was not by public auction, the sale would not be protected by this provision of the law; and the conclusion seems to be justified that a sale by a trustee after the lapse of a year could not be by private contract, but must be by public auction.

H. G. Nichols, for the plaintiff.

MORTON, C. J. William Mixter by the third clause of his will bequeaths to each of his children, George, Mary Ann, Fanny Louise (afterwards Fanny L. Howard), and Samuel Jason, the interest or income of twenty thousand dollars, to be paid to each at least annually, or as often as the income shall be received; said principal sum to be paid into the hands of trustees, and by them invested, and at the decease of either of the children "said principal sum of twenty thousand dollars, the income of which is given to the child deceased, shall be divided among the heirs at law of the deceased child."

By the sixth clause he gives the residue of his estate, real and personal, to his four children, "to be divided equally between them, share and share alike, to them, their heirs and assigns forever." There can be no doubt, under this clause, that each of the four children would take an absolute estate in one quarter

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of the residue. But he afterwards made a codicil which provides as follows:

"Whereas I have given to my daughter Fanny L. Howard, wife of Daniel W. Howard, in my said will, the income of twenty thousand dollars, and also a certain portion of my remaining estate, I now order and direct that all the property and estate so given my said daughter in addition to said income in said will shall be paid to the Boston Safe Deposit and Trust Company, an incorporated institution in the city of Boston, to be held by said corporation in trust for the benefit of my said daughter, Fanny L. Howard, to be invested by said corporation as shall seem prudent and safe; and that the net income thereof shall be paid to my said daughter, Fanny L. Howard, at least semi-annually, said income to be paid to my said daughter personally, or upon her order or receipt in writing, free from the interference or control of her husband or any creditors, my intention being that the use of said income shall not be anticipated by assignments; and at the decease of my said daughter I direct that said estate so left in trust shall be divided among her children, or the representatives of any deceased child, equally, share and share alike, giving to each child and the representatives of any deceased child, one share. If my said daughter shall leave no children living at her decease, then I direct that said sum so left in trust with said corporation shall be paid, one third to her husband, if living, but not to his heirs, if deceased, and the balance of said estate so left in trust shall be equally divided among her brothers and sisters, share and share alike."

This codicil is not in form a direct gift to the plaintiff as trustee, but it is in law equivalent to such a gift; and the first question in this case is whether under the codicil the plaintiff took an estate in fee in that portion of the real estate, namely, one undivided quarter, which would have come to the said Fanny under the sixth clause of the will, or only an estate for the life of said Fanny.

The will and codicil are not drawn with technical skill, but we think there is no difficulty in ascertaining the intentions of the testator. The sixth clause contemplates that the residue will consist of real and personal estate. Under it, if unchanged, the daughter Fanny would take one quarter of the personal prop-

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erty absolutely, and one undivided quarter of the real estate in fee.

The object of the codicil was to change the disposition of this share of said Fanny in the residue by putting the legal title in trustees, to give her the income during her life, and to provide for the division of the trust fund after her death. It gives to the plaintiff as trustee "all the property and estate so given my said daughter," implying that the trustee was to take the same property and estate which the daughter would take under the sixth clause. The codicil deals with the trust fund, which might at first consist of both real and personal estate, as a single fund subject to the same disposition.

It directs that at the decease of the daughter "said estate so left in trust shall be divided among her children," and that, if she leave no children, "said sum so left in trust with said corporation shall be paid one third to her husband," and "the balance of said estate so left in trust shall be equally divided among her brothers and sister." In these provisions he is clearly dealing with the whole trust estate as a single fund, and they imply that the trustee is to make the division according to his directions. It must do this so far as the fund consisted of personal property, and there is nothing to indicate that he intended that there should be any difference as to that part of the fund which at his death was real estate. The whole estate held in trust was "to be invested by said corporation as shall seem prudent and safe," which implies that the trustee may find it prudent to change the investments. The testator does not directly or by implication give any vested legal estate to those who under the codicil will be the distributees at his daughter's decease. He imposes upon the trustee the duty of dividing and transferring the fund after her death.

Looking at the whole will, it seems to us reasonably clear that he intended to give to the trustee the legal title to both the real and the personal estate, with the power to sell and convey the same, and that such a title in the trustee is necessary in order to enable it to carry out the purposes of the testator. *Sears* v. *Russell*, 8 Gray, 86. *Packard* v. *Marshall*, 138 Mass. 301.

The trustee, taking this view of the will, applied to the Probate Court for leave to sell the undivided fourth of the real estate

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held by it in trust, and the court ordered and decreed that the estate so held in trust be sold at private sale, and that the proceeds be reinvested and held upon the same trusts under which the real estate was held. The defendant contends that a valid sale cannot be made under this decree, because the notice given of the petition was insufficient. We can see no force in this claim. Upon such a petition notice is to be "given in such manner as the court may order, to all persons who are or may become interested in such estate, and to all persons whose issue, not then in being, may become so interested." Pub. Sts. c. 141, § 21.

The caption of the order of notice issued by the court did not follow the words of the statute, but the words used, "heirs at law, next of kin, and all other persons interested in the real estate," embrace and describe all living persons who are or can become interested, or whose issue may become interested, and was sufficient.

The defendant further contends that a good deed cannot now be given by the trustee, because more than a year has elapsed since the license to sell was given. The statutes do not provide that a license to a trustee to sell real estate shall not be in force more than a year. Trustees may be licensed to sell, either at public or private sale, when it appears to be necessary or expedient. Pub. Sts. c. 141, § 20. As a general rule, executors, administrators, and guardians can be licensed to sell only by public auction. Pub. Sts. c. 134, §§ 1–11. Pub. Sts. c. 140, §§ 1, 8, 18.

In the Pub. Sts. c. 142, which contains many provisions relating to sales by executors, administrators, guardians, and trustees, it is provided in § 8 that "no license for a sale by an executor, administrator, or guardian shall be in force for more than one year after the granting thereof," but there is no equivalent or similar provision in our statutes as to sales by trustees.

Section 18 provides that "No sale of real estate made by an executor, administrator, guardian, trustee, or other person by license of court, and no title under such a sale, shall be avoided for the reason that the deed was not delivered within one year after the license, or on account of any irregularity in the proceedings, if it appears, —

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"First, that the license was granted by a court of competent jurisdiction;

"Second, that the person licensed gave a bond which was approved by the judge of the Probate Court, if a bond was required upon the granting of the license;

"Third, that the notice of the time and place of sale was given according to the order of the court; and,

"Fourth, that the premises were sold by public auction in accordance with the notice, and are held by one who purchased them in good faith."

The defendant argues that this statute by implication prohibits a trustee from making a sale after the lapse of a year from the granting of his license, except by public auction. No such implication is necessary or justifiable. This provision is a re-enactment of the St. of 1864, c. 137. It is an enabling, and not a disabling statute. It was not intended to cut down the powers of executors, administrators, guardians, or trustees, but to cure any formal and unimportant irregularities in their actions in making sales. It was not designed to create irregularities, but to remedy them. It cannot fairly be construed as providing that, if a trustee does not sell within a year, which he is not bound to do, it shall be an irregularity which can be cured only by a sale by auction. Most of the provisions are pertinent as applied to executors, administrators, and guardians, but have no application to trustees who ordinarily are not required to give bond, or to sell by public auction, or to give any notice of the time and place of sale. It is not improbable that the word "trustee" was inadvertently used in the statute. But however this may be, we cannot think that it was the intention of the Legislature to make in this indirect way so important a change in the other provisions of the statute as to require trustees to sell within a year, or otherwise to sell by public auction.

Upon the whole case, therefore, we are of opinion that the deed which the plaintiff has tendered to the defendant will convey a good title in fee; and, in accordance with the stipulation in the case stated, judgment was rightly entered for the plaintiff in the Superior Court. *Judgment affirmed.*

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BOSTON AND MAINE RAILROAD *vs.* ROBERT W. CHIPMAN.

Suffolk. January 11, 1888. — January 12, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Railroad — Coupon Ticket — Evidence — Waiver.

A condition on a railroad coupon ticket that the coupons are to be "detached by or in the presence of the conductor, and will be accepted for passage only when accompanied by this ticket," is reasonable and valid.

The holder of such a coupon ticket tendered as his fare a detached coupon, which the defendant refused to take unless the ticket was shown. Evidence was offered, in an action for the fare, that the conductor had accepted such coupons on prior occasions from the holder and others, and on the same occasion from others, in payment of fares, without demanding the tickets. *Held*, that the conductor was not required to accept the detached coupon and could demand the production of the ticket, and that the evidence would not justify a finding of a waiver of the condition.

CONTRACT to recover twenty-nine cents, the fare between Boston and Melrose Highlands. Trial in the Superior Court, on appeal, without a jury, before *Mason*, J., who reported the case for the consideration of this court, in substance as follows:

The following facts were admitted by both parties. The plaintiff operates a railroad, and had established reasonable rates for the transportation of passengers; the fare between Boston and Melrose Highlands for those paying their fare upon the train being twenty-nine cents.

The plaintiff had previously sold to the defendant, and many others, books containing coupons. The outside cover of the book bore the inscription, "Boston and Melrose Highlands," and on the inside of the cover was printed the following: "One hundred-ride ticket, Boston and Maine Railroad, good for one ride, and an additional ride for each coupon attached, between Boston and Melrose Highlands, continuous passage. Coupons to be detached by conductor only. (1200) D. T. Flanders, Gen. Ticket Agent." Each coupon was of the form following: "B. & M. R. R. I (1200) II Not good if detached." Upon the third page of the cover was printed, "Notice to passengers. Passengers will please take notice that the coupons attached hereto are to be detached by or in the presence of the

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conductor, and will be accepted for passage only when accompanied by this ticket."

This book, with coupons entitling the owner to one hundred rides between Boston and Melrose Highlands, was sold at a price less than that of one hundred separate single tickets between the same places.

When the conductor of the train on which the defendant was transported demanded of the defendant his fare, on March 20, 1886, the latter tendered for such fare a coupon which he had detached from a book, then in his possession, similar to that described above. The conductor declined to receive this coupon as a fare, unless the defendant would exhibit the book from which he had detached the coupon, but offered to receive it in payment of fare if the defendant would exhibit such book. The defendant declined to do this, and refused to pay his fare in any other manner, and has not paid it, unless the tender above described amounts to payment.

The defendant offered evidence tending to show that, for a long time next prior to March 20, 1886, it had been the custom for passengers, including the defendant, to detach coupon tickets and pay their fares therewith, without showing their books to the plaintiff's conductor, he not having demanded to see the books. The defendant had so paid his fares for a long time next prior to March 20, 1886, without objection or warning not to detach the coupon, and without being requested to exhibit his book; and, at the time referred to, other passengers on the same car gave coupons detached by them in payment of their fares, and the same were received without objection and without their being requested to show their books. This evidence was excluded.

Upon the facts admitted, the judge found for the plaintiff, and assessed damages in the sum of twenty-nine cents. If the evidence excluded was properly excluded, and the finding upon the admitted facts was correct, judgment was to be entered for the plaintiff for twenty-nine cents; otherwise, a new trial was to be had.

W. S. Stearns & J. H. Butler, (*W. H. Stearns* with them,) for the defendant.

S. Lincoln, for the plaintiff.

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BY THE COURT. The contract, of which the book and the coupons therein sold to the defendant by the plaintiff are the evidence, is a reasonable and valid one. Under it the plaintiff's conductor was not required to accept as the defendant's fare a detached coupon, and had at least the right to demand that he should produce and show the book.

There was no evidence which would justify the finding that the plaintiff had rescinded or waived any of the conditions or terms of the contract. *Judgment for the plaintiff.*

WILLIAM I. BOWDITCH & another *vs.* CHARLES E. RAYMOND & another.

Suffolk. November 9, 1887. — January 16, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Lease — Rent — Insolvency — Proof of Claim.

The St. of 1879, c. 245, § 1, re-enacted in the Pub. Sts. c. 157, § 26, as to the acceptance or surrender by assignees in insolvency of leases or agreements in writing for use and occupation, does not apply to a lease determined before the first publication of notice.

A lease provided that, if the lessees should assign for the benefit of creditors, the lessors might enter to end the lease, and, in their discretion, relet the premises at the lessees' risk, who were to continue liable for the rent and to be credited with any sums realized from the reletting. The lessees made an assignment and the lessors entered to determine the lease. Subsequently the lessees went into insolvency, and thereafter the lessors relet the premises at a reduced rental. *Held*, that a claim against the insolvent estate, being the difference between the rent as reserved and sums received by the lessors, was rightly disallowed.

APPEAL from a decision of the Court of Insolvency, disallowing the claim of the appellants against an insolvent estate. The appeal was heard in the Superior Court, without a jury, by *Mason*, J., on agreed facts, which, so far as material, are as follows:

On March 30, 1883, the appellants, as trustees, made a lease to McDewell and Adams of the premises numbered 156 Tremont Street in Boston for a term of ten years "from the first day of November, A. D. 1884," at a yearly rent of $10,000, payable in

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equal monthly payments, the first payment to be made on December 1, 1884. The lease provided that, if the "lessees shall be declared bankrupt or insolvent according to law, or if any assignment shall be made of their property for the benefit of creditors, then and in either of said cases the lessors, or those having their estate in the said premises, lawfully may, immediately or at any time thereafter, and whilst such neglect or default continues, and without further notice or demand, enter into and upon the said premises, or any part thereof, in the name of the whole, and repossess the same as of their former estate, and expel the said lessees, and those claiming under them, and remove their effects (forcibly if necessary), without being taken or deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant; and thereupon the lessors may, at their discretion, relet the premises at the risk of the lessees, who shall remain for the residue of said term responsible for the rent and taxes herein reserved, and shall be credited with such amounts only as shall be by the lessors actually realized. Also, that in case the premises, or any part thereof, shall during said term be destroyed or damaged by fire," the rent was to be proportionately abated until the said premises should have been put in proper condition for use.

On October 15, 1884, the lessees, who were in possession of the premises under an agreement with prior lessees, made a voluntary assignment for the benefit of creditors, and on November 1, 1884, the lessors entered upon the premises to terminate the lease, and from and after December 1, 1884, were in possession of the premises.

On December 2, 1884, the lessees filed a petition in insolvency, subsequently filing a schedule of creditors, which included their liability under the lease. On December 30, 1884, the appellees, who had been chosen assignees of the estate, filed in the Court of Insolvency a disclaimer of the lease.

On February 21, 1885, the lessors relet the premises for the residue of the term at a reduced rental, and their claim, which was disallowed, was for the difference between the rent reserved in the original lease and such reduced rental and certain minor matters.

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The judge found for the appellees, and reported the case for the determination of this court.

J. B. Warner, for the appellants.

I. The first question is whether McDewell and Adams are still liable upon their covenant, and remain responsible for rent for the residue of the term. This seems clear: the stipulation in a lease by which the lessor may re-enter for breach of condition, relet the premises at his discretion, and hold the lessee for any loss of rent, has been found in the usual forms of lease for a generation, and was passed upon by this court nearly twenty-five years ago in *Way* v. *Reed*, 6 Allen, 364.

The entry on November 1, 1884, whether that day be regarded as included within the term or not, did not terminate the liability of the tenants upon their covenant. Even before the term actually began, the lessees had an interest, *interesse termini*, which, though not an estate, is recognized by the law as something more than a contract. Taylor, Landlord and Tenant, § 176. Com. Dig. Assignment (A), Estates (G 14). Shep. Touch. 267. Co. Litt. 46 b, 51 b. *Whitney* v. *Allaire*, 1 N. Y. 305, 311. The lessee's obligation to pay rent springs from his covenant, and is wholly independent of possession, being complete though he never enters, or even gives notice that he will not occupy, and his only defence would be some wrongful act of the lessor preventing possession. Taylor, Landlord and Tenant, *ubi supra*. *Becar* v. *Flues*, 64 N. Y. 518. *Birckhead* v. *Cummins*, 4 Vroom, 44. *Spencer* v. *Burton*, 5 Blackf. 57.

II. The question of the admissibility of the proof in insolvency is first to be considered under the provisions of the insolvency statute prior to the amendment of 1879. Inasmuch as the debtor cannot get his discharge from his liability unless it is provable, the question concerns the debtor as much as the creditor. The word "debts" in that statute is to be construed liberally, in order to accomplish the two ground objects of the act; the objects, namely, of relieving the debtor who surrenders his property, and of distributing that property among his creditors.

The statute is highly equitable in its character, and has always been administered avowedly upon equitable principles. *Lothrop* v. *Reed*, 13 Allen, 294. *Gray* v. *Bennett*, 3 Met. 522. *Brown* v. *Lamb*, 6 Met. 203.

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It is certainly true that a claim for rent not yet due has not been considered admissible in proof either in insolvency or bankruptcy. *Savory* v. *Stocking*, 4 Cush. 607. *Ex parte Houghton*, 1 Lowell, 554. *Treadwell* v. *Marden*, 123 Mass. 390. But this is for the reasons stated by Shaw, C. J., in *Boardman* v. *Osborn*, 23 Pick. 295; namely, that rent is supposed to come out of the profits of the land, and occupation is the consideration for it, therefore no action should lie before it has actually accrued; and Lord Coke is quoted to the effect that a release of all actions would not release rent subsequently accruing on an existing lease. These reasons do not apply here. The lessees in this case are now liable, absolutely, to a fixed monthly payment, which, though still alluded to as rent, should, for the purposes of this discussion, be designated as a sum equal to the former rental. The obligation does not depend upon occupation, nor is it liable to be terminated by eviction.

There is no question of an estate in the lessee out of which the rent is said to grow, — there is a simple contract liability. Can there be any doubt, to apply Lord Coke's test, that a general release given by these appellants to the lessees would discharge them from this covenant? If so, there is a present liability.

We submit that the existence of the liability is complete; that the only question is that of amount, and that this is certain because it may be made certain. As matters now stand, there is a covenant to pay a fixed sum, and the landlord holds property, namely, the lease the income of which he is bound to apply to the debt. This is in effect only a debt secured, the security being the lease. Or it may be considered, what it in reality is, a case where, in a sale of a chattel, the vendee has refused to accept, and the vendor is entitled to the stipulated price, less the value of the goods.

Our insolvency system, unlike the English, provides the machinery through a jury trial, by which just such questions as this may be dealt with (*Lothrop* v. *Reed*, *supra*); and we ask only to have this contract treated as any other contract, and damages estimated, as was done in the case just cited, since the stipulation of the parties fixing the lessees' liability follows exactly the principles which the law would have applied without it. *Whitney* v. *Boardman*, 118 Mass. 242. *Abbott* v. *Stearns*, 139 Mass. 168, 172.

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Opposed to our contention is the case of *Ex parte Lake*, 2 Lowell, 544. In this case, a claim arose under a covenant in a lease precisely the same in terms with that which we are discussing, and Judge Lowell held that the claim was not provable. As to this case we must say that the learned judge seems to exclude the claim because the word "rent" was used, and without reference to the reasons upon which the rule as to rent stands, none of which seem applicable, and seems also to disappoint the just expectations which he had raised in *Ex parte Houghton*, 1 Lowell, 554. The decision in the second case can hardly stand with the suggestions of the former, which retain their weight and value, though now overlooked. We submit that this case should not control this court in administering our insolvency act.

Against this we put the contrary and more equitable decision of the United States District Court in *In re Clancy*, 10 Nat. Bankr. Reg. 215. The controlling fact there, namely, that what was rent in name was no longer dependent on occupation, is the decisive consideration here.

III. We come now to the St. of 1879, c. 245, passed expressly to meet the case of subsequently accruing rent. This statute seems to be explicit enough; but the defendants seek to avoid its effect in this case by a technical argument, which, if we understand it, is this.

The statute, they say, contemplates only a case where the lease carries a beneficial interest, and where the assignee has the alternative presented him of accepting or refusing such an interest. The use of the word "property" and the provision for an election both, according to their contention, limit the statute to such leases as still confer a right of occupation, and if for any reason the insolvent had lost his right of occupation, as by assignment of the lease, or by the operation of some provision in it, then the statute does not apply, since the assignee has no real choice.

This, surely, is a somewhat liberal construction to put upon a statute for the relief of insolvent debtors. The cases where relief is most needed, those, namely, of liability with no corresponding benefit remaining, are, on this theory, the cases not provided for.

The whole spirit and purpose of the act, as already pointed out, require the most liberal and equitable interpretation. It was unquestionably passed in consequence of the previous

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decisions, and for the purpose of giving the creditor his proof, and the debtor his discharge.

No amendment was needed in order to give to the assignee full rights over leasehold property held by the insolvent. The assignee always had the alternative either to assume such a lease and be bound by its provisions, or to disclaim it and be free from all liability. *Hoyt* v. *Stoddard*, 2 Allen, 442. *Commonwealth* v. *Franklin Ins. Co.* 115 Mass. 278. *Abbott* v. *Stearns*, 139 Mass. 168. *Ex parte Houghton*, 1 Lowell, 554. The real purpose of the act is found in the later clauses, which introduce the new feature of giving the insolvent his discharge.

Our statute was "plainly taken, with some modifications, from the English bankruptcy act of 1869" (*Abbott* v. *Stearns*, 139 Mass. 168), and the decisions under that act throw great light upon this question. *Ex parte Dyke*, 22 Ch. D. 410. *Ex parte Patterson*, 11 Ch. D. 908. *In re Maughan*, 14 Q. B. D. 956. *Ex parte Corbett*, 14 Ch. D. 122. *In re Tickle*, 3 Morrell, 126. *Ex parte Walton*, 17 Ch. D. 746.

W. G. Russell, (*E. B. Hale* with him,) for the appellees.

MORTON, C. J. Under our insolvent law, prior to the St. of 1879, c. 245, no debts, with certain exceptions not material to this case, were provable, unless they were debts "absolutely due" at the time of the first publication of the notice of issuing the warrant. It has accordingly been repeatedly held that future rent, to accrue under a lease in which the insolvent debtor is lessee, cannot be proved. *Savory* v. *Stocking*, 4 Cush. 607. *Treadwell* v. *Marden*, 123 Mass. 390. *Deane* v. *Caldwell*, 127 Mass. 242. *Ex parte Houghton*, 1 Lowell, 554.

The principle of these cases is, that such rent is not a debt absolutely due at the time of the first publication. The lease may be terminated by the eviction of the lessee or otherwise, and no rent may ever accrue or become due. The lessor's claim is a contingent one. It is not contingent merely as to amount, but the very existence of the claim depends upon a contingency. *Boardman* v. *Osborn*, 23 Pick. 295.

In the case before us the lease contains the provision that, if the lessees shall be declared bankrupt or insolvent, or shall make an assignment for the benefit of their creditors, the lessors may enter and expel the lessees, "and thereupon the lessors

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may, at their discretion, relet the premises at the risk of the lessees, who shall remain for the residue of said term responsible for the rent and taxes herein reserved, and shall be credited only with such amounts as shall be by the lessors actually realized." The appellants contend that under this provision the liability of the lessees arises solely from their covenant, and that the amount to be paid by them is not technically rent, as the provision does not contemplate that they are to occupy the premises. But however this may be, the sums to be paid partake of the character of rent so largely that they come within the same principle. The covenant is to pay the rent reserved reduced by such sum as the lessors might receive from the new lessees if they should relet the premises.

At the first publication of notice there was a contingency, not merely as to the amount of liability, but as to whether it would ever attach or arise out of the covenant. The lessors in their discretion might not relet the premises, but resume possession of them. It may be that the lessees will be evicted by a paramount title, in which case it cannot be doubted that the liability of the original lessees would be terminated, or fail to attach. It may happen that the new lessees will pay as large a sum as the rent and taxes reserved in the lease, in which event no liability would arise under the covenant. Or the premises might be destroyed by fire, and thus the liability of the lessees be terminated. The existence of any debt in the future depends upon contingencies, and therefore the appellants' claim cannot be proved under our insolvent law prior to the St. of 1879.

In the bankrupt court of this district it has been decided that a claim under a like clause in a lease could not be proved in bankruptcy. *Ex parte Lake*, 2 Lowell, 544.

The next question is, What is the effect of the St. of 1879, c. 245, § 1, re-enacted in the Pub. Sts. c. 157, § 26? The part of the statute which is of importance in this case is as follows: "When any of the property of a debtor consists of a lease or agreement in writing, whereby he is liable for the rent therein reserved or for the use and occupation of premises as therein stipulated, the assignee at any time may, and at the request in writing of either the debtor, or of the lessor, or of those having his estate in the premises, shall, within twenty days after such

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request, by a written instrument filed with the records of the case, elect either to accept and hold under said lease or agreement in writing, or to disclaim the same; and if he elects to disclaim, such lease or agreement in writing shall thereupon be deemed to have been surrendered as of the day on which said disclaimer was so filed. And the debtor, provided he obtains his discharge in insolvency, shall be discharged from all liability under or by reason of said lease or agreement in writing, whether the assignee does or does not disclaim the same as aforesaid; and the lessor or those having his estate in the premises may prove such damages, if any, as are caused by such surrender, as a debt against the estate of the debtor."

The objects of the statute were to define the rights and duties of assignees when they found a part of the property of the debtor to consist of a lease or other instrument under which he was liable for rent or for use and occupation, and to give them the right to accept or disclaim such property, as the interests of the estate required; to enlarge the effect of the debtor's discharge by making it a bar to his liability under such lease or agreement; and to give to the lessor thereunder the correlative right to prove his damages if it is disclaimed and surrendered.

All parts of the statute refer to the case where there is property of the debtor consisting of a lease or an agreement for use and occupation. In other words, the provisions as to the discharge of the debtor and the proof by the lessor apply only to the case where there is an existing lease or agreement which the assignee can accept or surrender. The lessors can prove only such damages as are caused "by such surrender."

In inquiring whether the statute applies to the case at bar, we are met with this difficulty. Before the first publication of notice, the lessors had entered upon the premises and expelled the lessees, and thus practically terminated the lease. The lessees had no longer any rights in the premises; they could not occupy them; they could not re-enter; the only interest they had in the matter was a bare liability under their covenant or agreement to indemnify the lessors for any deficiency in the amount they might realize from new tenants if they chose to let to such tenants. There was no property of the debtor which the assignee could accept; there was no right or interest in the

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debtor which the assignee, if he had undertaken to accept, could take or hold; and there was nothing for him to surrender.

Suppose this had been a case where the lessors had entered and expelled the insolvent two or three years before the insolvency. Could an assignee under the guise of accepting the lease revive it, and subject the estate to the liability of indemnifying the lessors for any deficiency in the rent, and thus make them preferred creditors? In such a case there is no election for the assignee to make; there is nothing to accept and nothing to surrender, and we are of opinion that it does not fall within the statute.

The Legislature had in mind the ordinary case of an existing lease or agreement; it did not contemplate a case like the one before us, and did not provide for it.

The appellants cite several English cases arising under the bankruptcy act of 1869, from which our statute of 1879 was taken with some modifications. 32 & 33 Vict. c. 71, § 23. *Ex parte Dyke*, 22 Ch. D. 410. *Ex parte Patterson*, 11 Ch. D. 908. *In re Maughan*, 14 Q. B. D. 956. *Ex parte Corbett*, 14 Ch. D. 122. *In re Tickle*, 3 Morrell, 126. *Ex parte Walton*, 17 Ch. D. 746.

The English bankruptcy statutes differ so much from our insolvent law that adjudications under the former are of very little aid to us in determining the construction of our statutes. But it will be found upon examination that the cases cited are not like the case at bar. In each of them there was an existing lease or term vested in the bankrupt at the institution of the bankruptcy proceedings, having more or less time to run.

We have considered the case in the light most favorable to the appellants, as if they had entered and expelled the lessees after the lease went into operation. We do not find it necessary to consider whether they in fact took possession before the term commenced, nor, if they did so, what would be the effect upon the rights of the lessors and lessees. The facts, that the assignees disclaimed the lease in this case, and that the insolvent debtors entered the appellants' claim upon the schedule of creditors, are unimportant. Neither could thus change the application of the statute, or affect the rights of the creditors.

Judgment for the appellees.

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ISAAC FENNO *vs.* CLARENCE H. GAY.

Suffolk. January 12, 1888. — January 16, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Demand Note — Statute of Limitations.

An action brought on May 21, 1886, on a promissory note dated May 20, 1880, and payable "on demand after date," is barred by the statute of limitations.

CONTRACT against the defendant, as the maker of a promissory note dated May 20, 1880, payable "on demand, after date," to the order of John Everitt, and by him indorsed to the plaintiff. Writ dated May 21, 1886. The answer set up, among other defences, the statute of limitations.

In the Superior Court, *Brigham*, C. J., who heard the case, without a jury, ruled that the action was not commenced within six years next after the cause of action accrued, and found for the defendant upon that ground only. The plaintiff alleged exceptions.

E. O. Shepard, for the plaintiff.

F. T. Benner, for the defendant.

BY THE COURT. It was held in *Hitchings* v. *Edmands*, 132 Mass. 338, that a promissory note payable "on demand, after date," is not a note payable on time, but "is an ordinary demand note, payable at once on demand, on which an action could have been brought immediately after it was given, without any demand." This is decisive of the case at bar. An action might have been brought on the note in suit at any time on May 20, 1880, after it was given.

It follows that this suit, commenced May 21, 1886, was not brought within six years after the cause of action accrued, and that the statute of limitations is a bar.

Exceptions overruled.

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WINNIFRED SHORT *vs.* JOHN DEVINE.

Bristol. October 26, 1887. — February 6, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & HOLMES, JJ.

Deed — Reservation — Right of Way — Partition Fence — Gates.

A reservation in a deed of a right of way "over a strip of land ten feet wide" describes the land over which the grantor may enjoy the right, and not the limits of the way itself; and the grantee may use the strip for any purpose not inconsistent with such enjoyment.

The owner of a narrow lot on a city street conveyed the front part, on the northerly side of which stood a house covering nearly two thirds of its width, reserving for the benefit of the rear part a right of way "over a strip of land ten feet wide on the southerly line of the granted premises." The grantee erected a partition fence on the "south line of the way," and put up gates at either end of the "strip," and an action was brought for obstructing the way. *Held*, that the partition fence on what must be taken to be the division line was not an obstruction, and that, in the absence of controlling evidence, the gates were rightfully maintained.

TORT for the obstruction of a right of way across the defendant's land in Fall River. The plaintiff's husband was joined as a party plaintiff.

Trial in the Superior Court, before *Barker*, J., who reported the case for the determination of this court, as follows:

Thomas Devine, who owned the premises, shown on a plan used at the trial, a copy of which is printed on the next page, conveyed the defendant's land to him by a deed, which described it as beginning at a corner of other land of the grantor on the easterly side of North Court Street, thence running northerly by that street $43\frac{8}{100}$ feet to land formerly of Murphy, thence easterly by Murphy's land $88\frac{47}{100}$ feet, thence southerly and westerly "by land of said grantor's to the point of beginning, containing fourteen (14) rods of land, more or less," and set forth that "the grantor reserves to himself, his heirs and assigns, to pass and repass over and upon a strip of land ten (10) feet in width on the southerly line of above granted premises to and from North Court Street with teams and otherwise."

By his will Thomas Devine devised the rest of the premises shown on the plan as follows: "2d. To my daughter Mary Ann O'Day the dwelling-house in which I now reside, and fourteen

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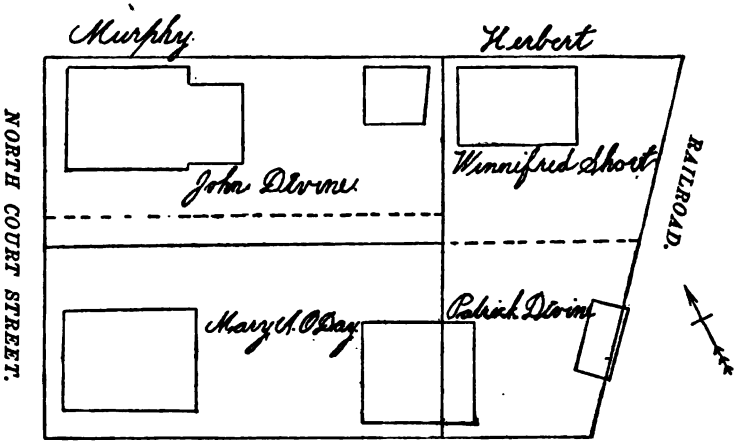
rods of land; said house being situate on North Court Street in Fall River, and being south of the lot of land heretofore conveyed by me to my son John Devine; to her, her heirs and assigns, with all privileges, easements, and appurtenances thereto belonging. 3d. To my daughter Winnifred Short, the house and seven (7) rods of land, built by me and located easterly of the house of my son John, on his lot before mentioned; to her, her heirs and assigns, with all the privileges, easements, and appurtenances thereto belonging. 4th. To my son Patrick Devine, the house and seven (7) rods of land, situate easterly of the lot heretofore devised in this will to my daughter Mary Ann O'Day."

It was agreed that the plaintiff had a right of way over and upon the premises described in the deed of Thomas Devine to the defendant, within the limits named in said deed, this being the only way from the plaintiffs' premises, which were at the easterly end of said way, to the public highway; that the defendant had built, as a division fence, a close board fence, supported by posts, along and upon the south line of the way described in the deed, which is the south line of the defendant's premises, the fence and posts averaging from six to eight inches in thickness, and between four and five feet in height; that the defendant had also caused to be made and hung across and upon the way, at the easterly end thereof, two close board gates, — one of the gates being about five and a half feet in width, and hung at one end with hinges to the fence aforesaid, and fastened



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at the other end with a long iron rod or hook hooked into a staple in a stub set in the ground, and the other gate being about four feet wide and shutting upon the larger gate with a latch, both gates being between four and five feet in height, and ten feet and one half-inch wide; and that at the westerly end of said way there are two open slat gates, eleven feet wide, corresponding in width and manner of construction with those at the easterly end.

No question was made that, if the defendant had the right to erect and maintain gates and a fence, these were reasonable and suitable, and there was no evidence that the fence had at any time actually obstructed the plaintiff in the use of the way.

Upon these agreed facts, the plaintiff requested the judge to rule, and to instruct the jury, that, under the clause in the deed reserving a right of way, the fee remained in the grantor, and the plaintiff, as his devisee, acquired a right of way in the locus as appurtenant to the lot devised to her, and that she had a right to use it for all beneficial purposes for which a street or way might be rightfully used, including the ways mentioned in the deed of the grantor to the grantee and otherwise, without being obstructed in its use by gates, fences, bars, or otherwise; but that, if the fee did pass from the grantor to the grantee, the plaintiff had a right of way over the locus as appurtenant to the lot devised to her, and had a right to use the same as before named.

The judge declined so to rule, and ruled that the fee in the land over which the right of way was reserved in the deed passed to the grantee therein, and that the defendant, as owner thereof subject to the right of way, had the right to build and keep up suitable gates across the same at either end, and also to build and maintain a suitable division fence upon the line between him and the adjoining proprietor; and directed a verdict for the defendant.

Judgment was to be entered for the defendant upon the verdict, if the rulings and refusals to rule were correct; but if upon the facts the plaintiff was entitled to a judgment, then judgment was to be entered for the plaintiff for such sums as the parties might agree upon, or as an assessor might find.

J. C. Blaisdell, for the plaintiff.

J. M. Morton, for the defendant.

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W. ALLEN, J. Thomas Devine, under whom both parties claim, conveyed the northerly portion of his front land to the defendant, and in the deed reserved a right of way in these words: "The grantor reserves to himself, his heirs and assigns, to pass and repass over and upon a strip of land ten feet in width on the southerly line of above granted premises to and from North Court Street with teams and otherwise." In *Johnson* v. *Kinnicut*, 2 Cush. 153, the grantor conveyed the westerly portion of his land, the easterly line of the land conveyed being twenty feet westerly of the west wall of his store, and granted "the right of passing and repassing over the space of twenty feet between the west wall of the store aforesaid and the eastern line of the before granted premises." It was held that these words did not describe the limits of the way granted, but the close over which the grantee should have a convenient and suitable way, and that he could not object to obstructions of the "space" which did not interfere with a reasonable and convenient way for him. The reservation in the deed in the case at bar will not be construed more strictly against the grantee than the grant in the case cited would be construed against the grantor; and in other respects the cases are on all-fours, and differ from *Tucker* v. *Howard*, 122 Mass. 529, and *Nash* v. *New England Life Insurance Company*, 127 Mass. 91, both of which were grants of existing and defined "passageways" particularly described.

The statement in the report, that the division fence was built upon the south line of the way described in the deed, must be taken to mean the south line of the strip of land over which the right to pass and repass was granted, and that the south line of the way was also the division line, that is, the south line of the land conveyed, the line of the way coinciding with the division line between adjacent lands. The question in regard to the fence is, whether the building of a division fence upon the line was a disturbance of the plaintiff's right of way.

It does not appear that the division fence interfered, or could interfere with any suitable and reasonable way for the plaintiff over the strip of land. But if it should be assumed that the plaintiff had a right of way over the whole width of ten feet, we do not think that the fence would be an obstruction. The law

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provides for partition fences. Pub. Sts. c. 36, §§ 2, 7, 9. When the statute applies, the privileges and burdens prescribed in it apply to the land, and affect and modify the estate in it. The right to a partition fence is part of the estate in the land. The conveyance of the land includes the right and the duty to have a fence upon the division line; the burden of having one half of the fence upon the premises, and the privilege of having the other half upon the conterminous land. *Newell* v. *Hill*, 2 Met. 180. *Sparhawk* v. *Twichell*, 1 Allen, 450. *Kennedy* v. *Owen*, 131 Mass. 431. No easement or incumbrance can grow out of this right; it cannot constitute or work a breach of a covenant of warranty, or of quiet enjoyment, or against incumbrance in a conveyance of the land, nor a disturbance of a right of way granted over the land. How could the reservation of the right of way in the deed affect the right of the parties to it as to a partition fence?

The reservation in the deed of Thomas Devine to the defendant of a right of way over the land, the line of which coincided with the division line between the lands, could not affect the right to a partition fence on the line. Thomas Devine, the grantor, clearly had a right to have a partition fence, one half of which should be on the defendant's land that was subject to the right of way; and Mary Ann O'Day, his devisee of the land adjoining on that side, and of the right of way appurtenant to it, has the same right; and the defendant has no right to erect a fence wholly on her land. As against the plaintiff, it will not affect the defendant's right to a partition fence if the reservation shall be so construed as to give to Thomas Devine, and those holding, under him, the parcel of land on the southerly side of the way, the right of free access to the way from any part of that land, and to prevent the erection of any fence or obstruction on the division line between that parcel and the way. If the owner did not assert such right, but required or assented to the erection of a fence, the statutes in relation to partition fences would apply. The plaintiff is the devisee of Thomas Devine of another parcel of the land, bounding only on the easterly end of the way, and of the right of way over the strip of land to the street as appurtenant to that. The right she has is the right apportioned to the parcel she holds, and does not include

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a right to enter upon the way except at its termini, and gives her no right to prohibit the defendant and Mary Ann O'Day from erecting a partition fence between their lands. Under any construction that can be given to the reservation, we think that the defendant had a right, as against the plaintiff, to erect a division fence upon the line of the way, which we understand to be a fence one half of which is upon either side of the division line, and the ruling of the court on this point was correct.

The right of the defendant to erect gates must depend upon the facts and circumstances. The plaintiff's right was to pass and repass from the street to her house-lot over a strip of land ten feet wide belonging to the defendant. The gates were erected at the termini of the way, not in the middle of it, as in *Dickinson* v. *Whiting*, 141 Mass. 414. The passage through these was more than ten feet wide, and the only question in regard to them was whether the defendant had a right to maintain reasonable and suitable gates at the termini of the way.

Williams v. *Clark*, 140 Mass. 238, was on the construction of an agreement by a railroad corporation to furnish a convenient crossing. The crossing was built by the corporation in 1853, without gates or bars, and was so maintained by it and its successors until 1884. It was held that there was no right to obstruct the crossing by gates or bars. The court say: "While, in terms, it is not provided that this crossing should not be unobstructed by gates or bars, yet the facts that it was to be 'convenient,' and that the railroad company itself constructed and for many years permitted the existence of such a one, sufficiently show that what it intended to grant was a free right of passage. No usage or circumstances such as are shown where one grants a way or right of way over a field devoted to agricultural or other purposes, indicating that the right granted is to be subordinate to the rights of the grantor, or the use made by him of the premises, here exist. That a crossing obstructed by gates or bars is far less convenient to those entitled to use it, is fully conceded by the defendant's argument."

In *Welch* v. *Wilcox*, 101 Mass. 162, the owner of two adjoining estates in Charlestown conveyed one to the defendant, with the right to use "the passageway leading from Lexington Street,

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as now laid out," over the other estate, which he soon after conveyed to the plaintiff, excepting a three-foot passageway as laid out on the premises. There was no gate on Lexington Street, and the passage was open and remained so for eight years, when the plaintiff erected a gate at the end of it on Lexington Street, which narrowed the passage three inches. The defendant removed the gate. The case was submitted on agreed facts, one of which was that the defendant could show that passages of like character in Charlestown were without gates, and the court held that the plaintiff had no right to maintain the gate. The court say: "It does not appear in what manner the way was laid out, but we must infer that it was by some well marked boundaries known and recognized by both parties. There was no gate separating the passageway from the street at the time of these conveyances, and in the opinion of the court the plaintiff has no right to erect and maintain a gate at the entrance of said passageway, or to narrow the way as described. If the obstruction in the way had existed at the time of the deed to the defendant, or even if it had been shown that similar passageways were usually so closed, the plaintiff's claim would stand on stronger ground, for it may well be presumed that the parties to the grant were acquainted with the public usages, and created this easement with reference to those usages."

In *Underwood* v. *Carney*, 1 Cush. 285, the defendant owned a right of way over Morton Place, in Boston, subject to a prior right of way of the plaintiff. The defendant erected warehouses on the line of Morton Place, obstructing the place with sidewalks, trap-doors, shutters, &c. A ruling that the use made by the defendant of the way was a reasonable use was sustained, and judgment was entered on a verdict ordered for the defendant. The court say that "public usage, — the use, which others, similarly situated, make of their land, — is evidence of a reasonable use," and that that rule is decisive of the case; "for we are not satisfied, that the defendants have made any use of the passageway, or that they have done any acts on their lands adjoining thereto, which are not justified by a common and well established usage in the place."

In *O'Linda* v. *Lothrop*, 21 Pick. 292, the action was by the owner of the fee against the owner of a right of way for

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abuse of the right. The case was tried before Chief Justice Shaw and a jury, and was submitted to the jury under instructions as to what would be a reasonable use of the way. The opinion considers what is a reasonable use of a way, depending much on the local situation, and much on general usage.

The present case was tried before a jury, and comes up on the report of the judge, which states that the parties agreed upon certain facts, upon which the plaintiff asked for certain rulings and instructions to the jury, which were refused, that other rulings were given, and that a verdict was directed and taken for the defendant. In this respect, and in the fact that the action is by the owner of the right of way for obstructing the way, the case resembles *Underwood* v. *Carney*, *ubi supra*. The case was not submitted to the court upon an agreed statement of facts, but the parties agreed upon what facts could be proved, and the court ruled that they were not sufficient to sustain a verdict for the plaintiff. The form of the ruling was that the defendant had a right to maintain suitable gates; but the real ruling, as shown by the course of the trial, was that the plaintiff had not shown that the defendant did not have the right to maintain the gates. A person over whose land there is a right of way will or will not have a right to maintain gates at the ends of the way, according to circumstances.

Upon the facts in this case, we think it does not appear that the defendant had not the right, and it must be taken, for the purposes of this case, that he had the right. The defendant holds the fee of a house and lot on a public street, under a deed in which the grantor reserved a right of way. The grantor owned and occupied the adjoining lot on the street, and owned two smaller lots in the rear of the two upon the street. There were no division fences between the lots. It does not appear whether they were or were not fenced upon the street. The right reserved was to pass and repass over a strip of land ten feet wide next to the lot occupied by the grantor. At the time of the grantor's death there were houses upon the two lots in the rear, and those lots and the one occupied by him were devised by him to different children, the one in the rear of the defendant's lot being devised to the plaintiff, and occupied by her. The defendant's lot is about forty-four feet wide and eighty-

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eight feet deep. The plaintiff's lot is of the same width, and about one half the depth of the defendant's. Nothing appears as to the manner in which the way and the different lots have been used, and nothing as to the size and position of the houses except a plan without measurements and not stated to have been drawn to scale. It appears from the plan that the defendant's house is near the northerly line of his lot, and not far from the street, and occupies considerably more than half of the front of the lot, and that the strip of land on which is the right of way is a part of his door-yard.

It does not appear what the usage in Fall River and in the defendant's neighborhood is in regard to having fences in front of houses and gates at the entrance to yards. It is probable that there is some usage in regard to it, and it is reasonable to suppose that it may be customary to have such fences and gates. In the absence of any evidence to the contrary, it may be assumed that a person who receives a right to pass through his neighbor's yard receives it under the same conditions, as to an entrance to the yard, that owners generally impose upon themselves, and that the person who receives it would be likely, were he owner, to impose upon himself. It is not to be presumed from the mere fact that a person grants a right to pass through his yard to adjoining land, that he thereby agrees to leave his yard open to the public, and the reservation in a deed of a house and lot of a right to pass through the yard does not imply a right to remove usual and reasonable gates at the entrance. *Maxwell* v. *McAtee*, 9 B. Mon. 20. *Connery* v. *Brooke*, 73 Penn. St. 80.

All the facts and circumstances which are stated are consistent with the right of the defendant to maintain the gates, and nothing appears to restrict his right in that respect as owner of the fee. The court therefore properly ruled that he had the right to maintain suitable gates at either end of the strip of land over which the right of way was reserved.

Judgment on the verdict.

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COMMONWEALTH *vs.* GRIDLEY B. ROWELL.

Suffolk. February 3, 1888. — February 6, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Complaint — Surplusage — Evidence — Milk.

An averment in a complaint under the milk acts, that the defendants were "partners," is mere surplusage, and need not be proved.

On such a complaint, evidence that the defendant was on a wagon with a license number on it and containing milk cans, from one of which was taken adulterated milk, is competent on the issue that he was in possession of the milk to sell it.

COMPLAINT to the Municipal Court of the city of Boston, in two counts. The first count alleged that "Gridley B. Rowell and John A. Lawrence, copartners in trade," on July 22, 1887, "did have in their possession a certain quantity, that is to say one pint, of milk not of good standard quality, that is to say milk containing less than thirteen per cent of milk solids, with intent then and there unlawfully to sell the said milk." The second count alleged that "Rowell and the said Lawrence, copartners as aforesaid, did have in their possession a certain quantity, that is to say one pint, of milk, to which a certain foreign substance, to wit, annatto coloring-matter, had been added, with intent then and there unlawfully to sell the said milk."

In the Municipal Court, Lawrence was acquitted, and the defendant was tried and found guilty. Trial in the Superior Court, on appeal, before *Bacon*, J., who allowed a bill of exceptions in substance as follows:

The government introduced evidence tending to show that one pint of milk was taken from a two-quart can, not marked "Skimmed milk," on a team on which was painted the license number and the name "Rowell & Lawrence," — on which team was the defendant, with certain other cans of milk, — and that the milk was handed to a chemist, in the employ of the milk inspector, for analysis, both of whom testified as to the results.

There was also evidence, on cross-examination of the government witnesses, that there were other milk dealers in Boston named Rowell.

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The government offered no evidence tending to prove a copartnership between the defendant and Lawrence, and no evidence that the defendant was the servant or agent of said copartnership, or of any other person.

The defendant offered no evidence, and asked the judge to rule that, under the complaint, the defendant could not be convicted; but the judge declined so to rule, and ruled that if the jury believed beyond a reasonable doubt that the milk was in the possession of the defendant, at the time the sample was taken from the can, with intent to sell the same, he should be convicted, notwithstanding the allegations in the complaint in reference to copartnership with Lawrence.

The defendant requested the judge to instruct the jury: "1. In order to convict, the government must prove that there was a copartnership between Rowell and Lawrence, and that the defendant was one of said partners Rowell and Lawrence, the name on the wagon. 2. The government not having submitted any evidence that there was such a copartnership, and no evidence that he was a copartner, and no evidence that he was the servant or agent of said copartnership, or of any other person, he cannot be convicted. 3. The mere fact that the defendant was in the wagon marked Rowell and Lawrence would not of itself be evidence that he intended to sell the milk, or expose or exchange, or offer for sale or exchange, said milk. 4. If the cart did not belong to Rowell, then the milk was not in his possession."

The judge declined to give these instructions, but instructed the jury that, if the defendant was upon the wagon, and in charge of the same, that was evidence from which the jury might find that he was in possession of said milk with intent to sell the same. The jury returned a verdict of guilty on the second count, and of not guilty on the first count; and the defendant alleged exceptions.

F. A. Perry, for the defendant.

A. J. Waterman, Attorney General, (*H. C. Bliss*, Assistant Attorney General, with him,) for the Commonwealth.

MORTON, C. J. The first count of the complaint charges that "Gridley B. Rowell and John A. Lawrence, copartners in trade, of said Boston," had in their possession, with intent to sell it,

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milk not of good standard quality; the second count, upon which alone the defendant Rowell was convicted, charges that "the said Rowell and the said Lawrence, copartners as aforesaid," had in their possession, with intent to sell it, milk to which a foreign substance had been added.

The court refused to rule that it was necessary for the government to prove that Rowell and Lawrence were copartners, and the defendant Rowell excepted. The rule is that mere surplusage will not vitiate a complaint or indictment, and need not be established by proof.

The complaint must allege all the material elements which constitute the offence charged, and they must be proved. And if the complaint unnecessarily alleges anything which is descriptive of the identity of the offence, it must be proved as alleged. But any allegations not descriptive of the identity of the offence, which can be omitted without affecting the charge against the defendant, and without detriment to the complaint, may be treated as surplusage, and need not be proved. *Commonwealth* v. *Pray*, 13 Pick. 359. *Commonwealth* v. *Cooley*, 10 Pick. 37. *Commonwealth* v. *Lewis*, 1 Met. 151.

In the case at bar, the allegation that the defendants are copartners in trade is entirely immaterial. If it be stricken out the complaint is good, and the same offence is charged. It is not one of the elements of the offence that they were partners, and the allegation may be rejected as surplusage and need not be proved. The rulings of the court upon this subject were correct.

The court also correctly ruled that the fact that the defendant Rowell was upon the wagon, under the circumstances stated in the testimony in the case, was competent evidence for the jury upon the issue whether he was in possession of the milk with intent to sell it. *Exceptions overruled.*

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COMMONWEALTH *vs.* THOMAS FORD.

Middlesex. February 3, 1888. — February 6, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Evidence — Credibility — Prior Conviction — Charge to Jury.

Under the Pub. Sts. c. 169, § 19, the conviction either of a felony or of a misdemeanor may be shown to affect the credibility of a witness.

At a criminal trial it is within the discretion of the presiding judge, to the exercise of which no exception lies, to refuse to re-instruct the jury that they should not decide the case by a "majority or minority vote" and that "it is the right of any juror to stick to his judgment if he thinks he is right."

COMPLAINT for keeping and maintaining a common nuisance, to wit, a certain tenement used for the illegal sale and keeping for sale of intoxicating liquors.

At the trial in the Superior Court, on appeal, before *Aldrich*, J., the defendant was a witness in his own behalf, and the government offered in evidence a record showing his previous conviction of a similar offence. The defendant objected to the introduction of the record, and asked the judge to rule that the word "crime" in the Pub. Sts. c. 169, § 19, meant felony, and not misdemeanor. The judge overruled the objection, and allowed the record to be put in evidence.

After the jury had retired and been out several hours, they were sent for by the judge, and in reply to a question put by him they reported that they had been unable to agree. The judge then read to the jury that part of the report of the case of *Commonwealth* v. *Tuey*, 8 Cush. 1, beginning with the words, (on page 2,) "The only mode," and ending with "and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows," and also read that portion of the opinion in that case, (on page 4,) beginning with the words, "The jury room," and ending with "would become a most effectual obstacle to it."

The defendant then requested the judge to instruct the jury: "1. The case should not be decided with reference to a majority or minority vote of the jury; and 2. It is the right of any juror to stick to his judgment if he thinks he is right."

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The judge refused to give these instructions, which were in writing, but were not read to or in the hearing of the jury. The jury returned a verdict of guilty, and the defendant alleged exceptions.

T. Riley, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

By the Court. Under the Pub. Sts. c. 169, § 19, the conviction of a witness of any crime, whether a felony or a misdemeanor, may be shown to affect his credibility. *Commonwealth* v. *Hall*, 4 Allen, 305.

It is to be presumed that proper instructions were given; and such instructions necessarily implied that the jury could not act by a majority, and that each juror must act upon his own convictions. The judge was not required to repeat these principles, which every juror must have understood. Whether he should do so was within his discretion, and no exception lies to his refusal to give the further instructions at the time and in the form requested by the defendant. *Exceptions overruled.*

Commonwealth *vs.* Joseph Uhrig.

Middlesex. February 3, 1888. — February 6, 1888.

Present: Morton, C. J., Devens, C. Allen, Holmes, & Knowlton, JJ.

Intoxicating Liquors — Evidence — United States Tax Receipt — Constitutional Law.

The St. of 1887, c. 414, § 2, providing that the posting on premises described in § 1 of a "United States tax receipt as a dealer" in certain liquors, shall be "*prima facie* evidence" that he or his agent in charge "keeps for sale and sells such liquors," is valid so far as it authorizes evidence of such posting.

Complaint for keeping and maintaining a common nuisance, to wit, a certain tenement used for the illegal sale and keeping for sale of intoxicating liquors from May 1, 1887, to September 19, 1887.

At the trial in the Superior Court, on appeal, before *Aldrich*, J., it was admitted that the defendant was the proprietor and

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had control of the Prospect House, a public hotel in Cambridge. The district attorney called as a witness one Batchelder, and asked him the following question: "During the time covered by the complaint did you see posted in the defendant's premises a United States tax receipt as a dealer in spirituous or intoxicating liquors other than malt liquors?"

The defendant objected to the question, upon the ground that the St. of 1887, c. 414, so far as it authorized the introduction of such evidence, was unconstitutional and void. The judge overruled the objection, and the witness answered the question in the affirmative.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

H. E. Fales, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

By the Court. The fact that the defendant kept posted in his premises a United States tax receipt running to him as a dealer in spirituous or intoxicating liquors, is competent evidence that he kept the premises for the sale of liquor, irrespective of the provisions of the St. of 1887, c. 414.

So far as that statute authorizes the introduction of such evidence, it is merely declaratory of the common law, and is valid. In the case at bar, the only ruling was that the evidence was admissible; no ruling was asked or given as to the weight or effect of the evidence. The ruling given was clearly right, and we cannot properly consider any question not raised by the bill of exceptions. *Exceptions overruled.*

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CITY OF NEWBURYPORT *vs.* DANIEL CREEDON.

Essex. November 3, 1887. — February 15, 1888.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Essex County — Insane Person — Support — Statute.

Essex County may recover for the support of an insane person in its receptacle for the insane, under the Pub. Sts. c. 87, § 49, and is not restricted to § 47, as limited by the Pub. Sts. c. 220, §§ 60, 61.

HOLMES, J. This is an action under the St. of 1882, c. 113, to recover money paid by the plaintiff for the defendant's support in the Essex County receptacle for the insane at Ipswich. As the statute would not apply to a purely officious payment, the plaintiff seeks to show that it was bound to pay for the defendant's support there. It appears that the defendant had a settlement in the plaintiff city, and we assume that the defendant was a pauper at the time when the support was furnished and paid for. It was found that the terms of the Pub. Sts. c. 87, § 47, had not been complied with. The court ruled that the plaintiff was liable under that section only, and not under § 49 of the same chapter; and the plaintiff alleged exceptions.

There can be no doubt that the plaintiff falls within the words of § 49, or that it must prevail, unless the county of Essex is excepted by implication from the general words used, and is confined to such rights, if any, against towns where lunatics are settled, as are given by § 47. There is no obvious reason for making such a distinction, but the defendant contends that § 49 is merely a substantial re-enactment of a part of § 2 of the St. of 1836, c. 223, an act providing for lunatic asylums throughout the State, while § 47 represents a part of the later act of 1846, c. 154, §§ 1, 2, which made special provisions for the county of Essex; that this later act, by reference, attached certain conditions to the remedies given that county, and therefore overrode the earlier statute; and that the sections in the Public Statutes must be construed in the same way as the acts which they represent.

The St. of 1846, c. 154, § 2, gives the county the same remedies for the support of persons confined in the Essex lunatic asylum

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"as are provided in the preceding section for maintaining prisoners in the house of correction." By § 1, the "said county of Essex shall have the same remedies for maintaining prisoners committed to said house as are provided by law for the city of Boston in like cases." The counsel on both sides agree that § 2 thus gives the county the same remedies for the support of lunatics confined in the asylum as are provided by law for the city of Boston for maintaining prisoners in the house of correction, and that these are to be found in the Rev. Sts. c. 143, §§ 15, 16, re-enacted with important modifications in the Pub. Sts. c. 220, §§ 60–63, but then, as now, subjecting the remedy to the condition that the amount due should be certified as there required, (*Boston* v. *Amesbury*, 4 Met. 278,) whereas no such condition was expressed, at least in the act of 1836. Pub. Sts. c. 220, limits the remedy against towns much more, as we shall show.

The compilers of the General Statutes adopted the same construction in terms, and were followed by the Public Statutes. Gen. Sts. c. 74, § 2. Pub. Sts. c. 87, § 47.

It is at least doubtful, however, whether the St. of 1846, c. 154, § 2, meant anything more than that the county of Essex should have the same remedies as were provided by law for the city of Boston in like cases; that is, for the support of lunatics confined in the Boston lunatic asylum. By this interpretation the reference would be, not to the Rev. Sts. c. 143, but to the St. of 1839, c. 131, § 5, which corresponds almost word for word with the St. of 1836, c. 223, § 2, so far as it bears upon the present question. The St. of 1836 was held to give a remedy against the town of settlement in certain cases by necessary implication. *Watson* v. *Charlestown*, 5 Met. 54. The same would be true of the St. of 1839, by the same reasoning, and thus by the interpretation suggested we should avoid the anomaly of a different rule for Essex County from that which governs the other counties of the State. At the same time the argument for the defendant would be answered, so far as it depends on the order of the acts in point of time, which it mainly does. For if the original purport of the act of 1846 was not to put Essex County on a different footing from the others, the subsequent misunderstanding by the General Statutes and Public Statutes as to the acts to which it referred could not be held to set Essex apart for the first

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time, and to take it out of the broad provisions of the Pub. Sts. c. 87, § 49 (Gen. Sts. c. 74, § 6). In other words, if the Public Statutes should be read as a code all composed at the same time, we should have no doubt that § 49 applied to Essex County, for reasons which we shall state in a moment.

But supposing the defendant's interpretation of the act of 1846 to be the true one, the liability of towns for the support of persons committed to the house of correction was done away with, except in a limited class of cases, by the St. of 1843, c. 66, § 2, and it will be seen that the Pub. Sts. c. 220, § 61, (Gen. Sts. c. 178, § 58, amended by St. 1876, c. 148,) does not give counties the general remedy against towns of settlement provided by the Rev. Sts. c. 143, § 16. So that if the remedies of the county of Essex are limited to those given by the Pub. Sts. c. 220, § 61, referred to in the Pub. Sts. c. 87, § 47, they have now been cut down unwittingly, by changes made with a different intent upon a different subject matter, to much narrower limits than were imposed by the St. of 1846, however construed.

Such a result ought not to be, and we think that it is prevented by the changes which have been made in the Pub. Sts. c. 87, § 49, from the language of the original act of 1836. That act, as we have said, gave a remedy against towns, not in express terms, but by implication only. Then came the act of 1846, determining the remedies of Essex County by reference to other acts; then came modifications of the other acts supposed to be referred to; and then the acts of 1846 and 1836 were taken up into the Gen. Sts. c. 74, §§ 2, 6. The latter section gives a remedy in express terms which on their face and construed by their surroundings apply to all the counties. We are of opinion that these words, inserted as they were for the first time after the uncertainties introduced by the act of 1846 and the vicissitudes of the legislation upon which the section representing it has been made to depend, must be read as intended not only to place it beyond doubt that the counties had a remedy, but also to include all counties in a clear provision. The rest of the section, as to the comfortable support, government, and employment of "persons confined in said receptacles," undoubtedly refers to Essex, the receptacle in which is mentioned just above, as well as to other counties, as does also the

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provision that "such sum a week shall be allowed and paid for the support of persons so confined as the commissioners shall direct." We must give an equal scope to the following words, "and the same may be recovered of such person, or of any parent, kindred, master, guardian, city, or town obligated by law to maintain him." Pub. Sts. c. 87, § 49, is the same, except that it says "bound" instead of "obligated." We may note as a further reason for our construction, that this section gives a remedy against the person himself for the first time, unless it is given by implication by the Rev. Sts. c. 143, § 16.

But if Pub. Sts. c. 87, § 49, does apply to Essex County, then it is argued by the defendant, that, as the act of 1836 only gave a remedy to the county against the town by implication, it was subject by implication to the conditions in other cases; that is, the conditions expressed in the Rev. Sts. c. 143, §§ 15, 16; and therefore that the remedy expressly given by the Pub. Sts. c. 87, § 49, must be subject to the much more stringent terms and conditions in the Pub. Sts. c. 220, § 61. It is enough to say that, as the statute expresses no such terms or conditions, we cannot make it almost nugatory by implying them. The provision in the Pub. Sts. c. 220, § 60, for the county commissioners certifying the amount due, is made less necessary by the requirement that the sum to be paid in this case shall be directed by them in the first instance.

We may remark that, if the defendant's construction of the act of 1836 were the true one, then the act of 1846 did not put Essex County on a different footing from the other counties, and the defendant's main argument would be met in that way.

Exceptions sustained.

F. W. Hale, for the plaintiff.

N. N. Jones, for the defendant.

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COMMONWEALTH *vs.* HENRY PURDY.

Norfolk. November 21, 1887. — February 28, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Intoxicating Liquors — Complaint — Evidence — Time.

On a complaint dated August 23, 1887, and alleging the keeping for sale of intoxicating liquors on April 1, 1887, "and on divers days and times" between that date and November 1, 1886, evidence of such keeping prior to November 1, 1886, but within two years of the making of the complaint, is inadmissible.

COMPLAINT dated August 23, 1887, alleging that the defendant on April 1, 1887, at Medway, "and on divers days and times between said first day of April and the first day of November, eighteen hundred and eighty-six, did keep intoxicating liquors with intent to sell the same."

At the trial in the Superior Court, on appeal, before *Blodgett*, J., evidence was admitted, against the objection of the defendant, that on July 3, 1886, a seizure of liquors was made in the dwelling-house occupied by the defendant, but not in the part occupied by him as a store; and that the defendant, in a conversation had with a witness in July, 1886, had admitted that he had previously sold intoxicating liquors.

The judge instructed the jury that if the evidence proved beyond a reasonable doubt that the defendant kept at Medway intoxicating liquors with intent to sell the same at any time within two years before the making of the complaint, the jury would be authorized to find the defendant guilty.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

F. D. Ely, for the defendant.

H. C. Bliss, Assistant Attorney General, for the Commonwealth.

MORTON, C. J. The offence of keeping intoxicating liquors with intent to sell the same unlawfully may extend over many successive days, and may properly be charged with a continuando. *Commonwealth* v. *Chisholm*, 103 Mass. 213. When a continuing offence is charged, the time alleged is material; it is descriptive

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of the offence, and fixes its identity; and the evidence generally must be confined to acts done within the time specified, and the defendant can be convicted only for such acts. *Commonwealth* v. *Briggs*, 11 Met. 573. *Commonwealth* v. *Elwell*, 1 Gray, 463. *Commonwealth* v. *Dunster*, 145 Mass. 101.

In the case at bar the offence is charged with a continuando, and the Superior Court erred in admitting proof of acts of the defendant at times not specified in the complaint, and in ruling that he might be convicted if he kept intoxicating liquors with intent to sell the same at any time within two years before the making of the complaint. *Exceptions sustained.*

COMMONWEALTH *vs.* SIMON GEARY.

Suffolk. February 3, 1888. — February 28, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Intoxicating Liquors — Complaint — Evidence — Club.

On a complaint for an unlawful sale of intoxicating liquors, after evidence that the defendant was found behind a counter with his coat off, in possession of whiskey in a bottle with glasses, and that he then made the sale alleged, all of which is contradicted, the defendant may show that the whiskey belonged to a club, of which he was a member, and that it was for the use only of such members, who had no right, and were not permitted, to sell any.

A request for an instruction, at the trial of such complaint, that, if only a portion of the whiskey was paid for, but the entire contents of the bottle when passed were kept, the glasses being used merely to taste from, there was no complete sale, was rightly refused.

COMPLAINT to the Municipal Court of the city of Boston, for an unlawful sale of intoxicating liquors on August 14, 1887, to Daniel H. Drew. Trial in the Superior Court, on appeal, before *Bacon*, J., who allowed a bill of exceptions in substance as follows:

Drew and a brother officer testified that on August 14, 1887, they visited certain premises, and found the defendant behind a counter with his hat on and his coat off; that Drew called for whiskey and asked his companion what he would have, and he

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replied, the same; that the defendant passed them a bottle and two glasses, and Drew passed him two ten-cent pieces; and that they poured some of the contents of the bottle into the glasses, tasted it, poured it back into the bottle, and took bottle and contents away. On cross-examination, they admitted that they intended to obtain, and paid for, what is ordinarily considered in a bar-room as two drinks; that there was much more than that in the bottle; that from the time the bottle was passed to them the defendant did not regain possession of it or any of its contents; and that they poured some into the glasses, not to drink it, but to taste it.

The defendant testified that he was a member of an association that occupied the premises, and the liquor was owned by the association; that he had no control over it, and none of it was for sale; that at the time in question he had on his hat and coat; that he had been in the premises about twenty minutes with a friend whom he was talking with; that Drew and his companion came in; that the bottle was on the counter, and they took it, and paid no money; and that he called to have them bring it back, and, in going after them towards the door, was arrested. One Duffy, who was then present, testified substantially as the defendant did as to the transaction with Drew and his companion.

The defendant offered to show by several witnesses, who, with him, were members of an association called the Albany Associates, that the liquor on the premises was owned by the association, each member having contributed towards its purchase; that the defendant was simply a member, and had contributed the same amount as other members for the purchase of the liquor, as was their custom; that it was there only for the use of members; that none of it was for sale, and no member had a right, or was permitted, to sell any, all of which was excluded by the judge.

The judge instructed the jury as follows: The question to be determined is, whether the defendant did sell intoxicating liquors to one Daniel H. Drew. Did the officers go into the place and find the defendant behind the bar with his coat off? Did the officers call for whiskey, and did the defendant put it on the counter before them? Did they take some and pour it into two

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glasses? If so, this would make a sale, if he received two ten-cent pieces in payment. Those other arrangements and questions we have nothing to do with. Did the defendant do this act, as testified to by the officers? If so, he is guilty.

The defendant requested the judge to rule, that if the officers paid for only a portion of the whiskey, and the bottle was passed them for that purpose, and they retained possession of the entire contents, and simply used the glasses to taste from, to determine what it was, and took all away, there was not a complete sale. The judge declined so to instruct, and the jury returned a verdict of guilty. The defendant alleged exceptions.

H. F. Naphen, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

C. ALLEN, J. For the prosecution, evidence was introduced tending to establish certain criminatory facts, namely, that the defendant was behind the counter with his coat off, and in possession of whiskey in a bottle, with glasses; thus being apparently prepared for making sales. This evidence tended to confirm the direct testimony of the government witnesses, that a sale was made by him. The direct testimony of a sale being contradicted by two witnesses, it was obviously important for the defendant to show, if he could, that the circumstances which bore against him were consistent with his innocence. In this aspect, testimony was competent to show that the whiskey did not belong to him, but to a club of which he was a member; that the whiskey was there merely for the use of the members, and was not for sale; and that no member had a right, or was permitted, to sell any. No doubt all these things might be true, and yet the defendant be guilty; but their tendency was in favor of his innocence. The jury might properly find them sufficient to explain the suspicious circumstances against him, and thus to rebut the presumption of fact which might otherwise arise from them. *Commonwealth* v. *Cotton*, 138 Mass. 500. *Commonwealth* v. *Pomphret*, 137 Mass. 564.

The final instruction asked for was properly refused.

Exceptions sustained.

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COMMONWEALTH *vs.* JOHN SULLIVAN.

Suffolk. February 3, 1888. — February 28, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Lottery — Indictment — Evidence.

An indictment on the Pub. Sts. c. 209, § 1, alleging that the defendant "did set up and promote a certain lottery, ... which said lottery was then and there for money," is sufficient.

At the trial of an indictment for setting up and promoting a lottery, the evidence described a game substantially like the policy or envelope game, and the judge ruled that, if the evidence was believed, "it was a lottery and a setting up and promoting a lottery," and that the jury would be warranted in finding the defendant guilty. *Held*, that the ruling did not go too far.

On cross-examination a witness was asked if a person, present with him on another occasion when the game was played, did not charge him with having picked up on the floor a ticket produced at the trial, and with having proposed to swear that it was bought of the manager of the game. *Held*, that the exclusion of the question was within the judicial discretion.

If it does not appear with certainty that several transactions were not parts of one continuous setting up and promoting a lottery, the government is not obliged to elect one transaction on which to go to the jury.

INDICTMENT alleging that the defendant "did set up and promote a certain lottery, the name and a more particular description of which said lottery being to said jurors unknown, which said lottery was then and there for money, said lottery not being then and there authorized by law in said Commonwealth."

Trial in the Superior Court, before *Bacon*, J., who allowed a bill of exceptions, which, so far as material, was as follows:

Franklin H. Walker, the only witness called by the government, testified that he knew the defendant; that on April 1, 1886, he went to a small room in building No. 1156 Washington Street, Boston, in which was a long counter, and behind it were some men writing; that thirty minutes after he got there the defendant came in, took off his coat and hat, and said to one Graham, who was one of the writers, "I am ready to go to work"; that he asked the defendant if he was a writer there, and the defendant said he was, and on being further asked if he was the proprietor, replied that he was only hired there, and did it for money; that he asked the defendant to whom he should look for his

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money if he won any, and the defendant said he would settle all as soon as the drawings were made; that he gave the defendant four numbers, — what is called a "horse," that is, a combination of four numbers from a column of 78; that if he had given the defendant three numbers it would have been a "gig"; that he paid ten cents to the defendant; that he saw several other persons give the defendant numbers and give and take money; that the defendant gave him a ticket or piece of paper with 479 on it; and on being asked, "What does 479 stand for?" replied, "The number for the drawing; each drawing is numbered a class number. The drawings are put in envelopes."

Walker further testified, that he stayed there ten or fifteen minutes, and saw others receive from the defendant similar papers with numbers, and give money to him; that the defendant stood up and asked if there were any other parties that wanted to take part in the game; that the defendant took an envelope from the wall, and taking therefrom a slip of paper with twelve numbers in each column below 78, turned around and copied with chalk the numbers on a black-board, and also the class number; that then a man made a claim of five dollars, and the defendant paid him with money from the counter drawer; that then the defendant continued to write again, and he remained and saw another drawing made in the same way; that the numbers that the persons wanted to give the defendant, or call out, the defendant would write on slips of paper in place of the money he took from them; and that then, when the audience ceased to take part, another drawing was made, that is, the defendant took another envelope and took out a drawing just as he did in the other case.

Walker was then asked to "describe this game in full, — in detail"; but this question was excluded by the judge, and he proceeded to testify that his four numbers were 4, 17, 11, 44, and were not in the claim; that he was not entitled to any claim because those numbers did not appear in the claim, and that he did not draw any money. The latter portion of this testimony was objected to.

On cross-examination, Walker was asked, "Did one Washington go with you to this room on March 31, or April 3, 1886?" to which he replied, "Yes"; and "Did n't Washington charge you with picking up this paper you have produced, and other papers

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with numbers on them, from the room floor, and proposing to him to go into court and swear that they were bought of defendant and Graham, and did n't Washington say that he would n't have anything to do with you on that account?" The latter question was excluded, on objection by the district attorney.

The defendant also asked the judge to require the government to elect some transaction, complete by itself, on which they would go to the jury; but the judge refused so to rule, and ruled that the government might rely on all the transactions of said April 1, and that, as matter of law, if the jury should believe the evidence of Walker, "it was a lottery, and a setting up and promoting a lottery, and they would be warranted in finding that the defendant was guilty of setting up and promoting a lottery."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. L. Eldridge, (*D. F. Fitz* with him,) for the defendant.

A. J. Waterman, Attorney General, (*H. C. Bliss*, Assistant Attorney General, with him,) for the Commonwealth.

HOLMES, J. 1. This is an indictment under the Pub. Sts. c. 209, § 1, for setting up and promoting a lottery. The indictment follows the words of the statute, and is well enough.

2. The testimony described a game substantially similar to that described in *Commonwealth* v. *Wright*, 137 Mass. 250, which the jury found to be a lottery. The defendant asked the court to rule that there was no sufficient evidence to warrant a conviction. The court refused so to rule, but ruled that, if the evidence was believed, "it was a lottery, and a setting up and promoting a lottery," and that the jury would be warranted in finding the defendant guilty. If the statement that "it was a lottery," &c., was anything more than a preliminary explanation of why the court refused the defendant's request, the substance of the ruling made being that there was evidence for the jury, we cannot say that it went too far.

The testimony was not very clear, it is true, and further description seems to have been excluded on the defendant's objection. But if the evidence meant anything, it described a game in which a price was paid for a chance of a prize, and in which it purported to be determined by chance; that is, by means making the result independent of the will of the manager of the

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game, according to a scheme held out to the public, whether he who paid the money should have the prize or nothing. This having been determined to be a lottery in *Commonwealth* v. *Wright*, it is not necessary to go on forever taking the opinion of the jury in each new case that comes up. Whether or not a definitely described game falls within the prohibition of the statute, is a question of law. The defendant was bound to know at his peril. Whatever practical uncertainty courts may have felt upon a subject with which they are less well acquainted than some others of the community, in theory of law there is no uncertainty, and the sooner the question is relieved from doubt the better.

3. The court excluded a question by the defendant on cross-examination, whether one Washington, who, on another occasion, accompanied the witness to the same place, did not charge him with having picked up a paper produced, and with having proposed to Washington to swear that it was bought of the defendant, &c. The exclusion was proper, in the discretion of the court. There was no offer to prove that the witness acquiesced in the charge. The means of Washington's knowledge were not suggested. The witness might have been asked about the fact with which he was supposed to have been charged, and Washington might have been produced to contradict him if he could do so.

4. It did not appear with certainty that all the transactions of April 1 were not parts of one continuous setting up and promoting a lottery. The tendency of the evidence was the other way. The motion that the government should be required to elect some transaction complete in itself was rightly overruled.

Exceptions overruled.

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COMMONWEALTH *vs.* CHARLES O. TAY & another.

Middlesex. February 3, 1888. — February 28, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Intoxicating Liquors — Complaint — Surplusage — Instructions.

A complaint for unlawfully exposing and keeping for sale intoxicating liquors is supported by proof of such keeping for sale merely, and the averment of exposure may be rejected as surplusage.

If a judge at a criminal trial correctly instructs the jury as to the true interpretation of the statutes and law applicable thereto, no exception lies to his refusal to instruct them in terms that they may consider such statutes and law.

COMPLAINT to the First District Court of Eastern Middlesex, alleging that Charles O. Tay and Frank J. Daley, on January 15, 1887, "did expose and keep for sale intoxicating liquors, with intent unlawfully to sell the same in this Commonwealth," at Stoneham, without any "license, authority, or appointment."

At the trial in the Superior Court, on appeal, before *Hammond*, J., the complainant testified for the government that Daley kept a saloon on Central Street, wherein were cigars, tobacco, and light drinks; that he had a search-warrant, and on January 15, 1887, searched the saloon and a barn owned by one Emerson, fifty feet from Daley's saloon; that one could pass into the barn from the saloon over two open passageways; that in the barn he found a barrel of whiskey in the corner, two thirds full, with a lock-faucet upon it locked, and with a card upon it marked C. O. Tay, and covered over and concealed from sight by a sail-cloth, which barrel he carried away. This barrel of whiskey was claimed by Tay, who testified that he was an invalid, and that he had this liquor for his personal use, and who duly filed his claim as owner of the whiskey.

It appeared that the barn was leased by Emerson in 1885 to one Richardson, who had let a part of it to an expressman who was a brother of the defendant Daley, and a part for a month to Tay, from January 12, 1887, for which Tay had paid rent to Richardson; and that Daley alone kept and owned the saloon on Central Street, and Tay alone kept and owned a saloon on Main Street. There were no other intoxicating liquors found,

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nor, except as stated, was there evidence of any sale, or offering or exposing for sale, of the whiskey or other liquors.

It also appeared that the defendants were formerly in business together in the building occupied by Daley, but not within a year of the date of the complaint; that there was a private path leading from the back door of Daley's saloon to the window in the barn, through which was an opening; and that there were several empty flasks and empty lager beer bottles in the barn, near the barrel of whiskey, but Richardson testified that he owned them.

The defendants asked for these instructions: "1. That finding intoxicating liquors in the shop or barn is not *prima facie* evidence of keeping with intent to sell or expose for sale. 2. That the government must show that such liquor was kept with the intent to expose for sale or to sell in this Commonwealth. 3. That there must be an offer of the liquor by exposing it to those who might become purchasers. If the liquor is covered up, concealed, or deposited where its presence could not be seen or known to the public, it is not exposed for sale within the meaning of the statute. The words are to be taken together to get at the sense of the statute. 4. That the jury may consider the statutes of the Commonwealth relating to intoxicating liquors, and the law in the case."

The judge refused to give these instructions, but instructed the jury as follows: The burden is upon the government to satisfy you that the whiskey found in the barn was illegally kept for sale, or illegally exposed for sale, and that it was so kept or exposed by the defendants; that, as the defendants did not claim to have a license to sell spirituous or intoxicating liquor, if the whiskey was kept for sale and to be sold by defendants, or either of them, in this Commonwealth, or if any part of it was so kept, then the part so kept was illegally kept; that, upon the question of whether it was so kept, the jury may take into consideration all the circumstances disclosed in the evidence; that the mere fact that the whiskey was in the barn is not *prima facie* evidence one way or the other, but is simply one of the circumstances to be considered. If the whiskey, or any part of it, was illegally kept for sale, and the defendants, or either of them, so kept it, then the one who so kept it should be convicted. That the com-

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plaint is sustained if the jury are satisfied that the defendants kept the whiskey, or any part of it, for sale as above stated, although there was no exposure for sale, and that in this case there is no evidence to warrant a conviction upon the ground of exposure for sale.

The jury returned a verdict of guilty; and the defendants alleged exceptions.

A. V. Lynde, for the defendants.

A. J. Waterman, Attorney General, for the Commonwealth.

C. ALLEN, J. The defendants merely present a brief, which is very short, and does not show in detail the grounds on which he relies in support of his exceptions. The judge ruled that there was no evidence to warrant a conviction upon the ground of exposure for sale. But the complaint was well supported by proof of keeping for sale. *Commonwealth* v. *Atkins*, 136 Mass. 160. *Commonwealth* v. *Welch*, 140 Mass. 372. The averment of exposure might have been omitted. *Commonwealth* v. *Sprague*, 128 Mass. 75. *Commonwealth* v. *Peto*, 136 Mass. 155. The judge having correctly instructed the jury upon the true interpretation of the statutes, and upon the law relating to the case, there was no occasion to give the fourth instruction which was asked for. *Commonwealth* v. *Anthes*, 5 Gray, 185. *Commonwealth* v. *Thorniley*, 6 Allen, 445, 448. We see no error in the trial. *Exceptions overruled.*

JOHN T. DOOLEY *vs.* ARNOLD G. POTTER.

Berkshire. September 28, 1887. — February 29, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, & KNOWLTON, JJ.

Mortgage — Waiver — Accord and Satisfaction — Title — Interest.

A mortgage of land was made to secure certain notes. The mortgage was delivered, but a memorandum signed by the mortgagee provided for the safe keeping of the notes until the land was measured and the notes proportionately increased or reduced, and for remedying "any defects in said title." The notes were never delivered, but the mortgagor caused payments to be made on them, and in a second mortgage excepted the prior mortgage from the covenants, and stated the amount payable thereon; and a reconveyance of a portion of the land was made to the mortgagee. *Held*, on a bill in equity brought by an assignee of

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the second mortgage to redeem the land from the first mortgage, that the notes and mortgage became valid and subsisting by waiver, and that the title was made good.

The mortgagor made an agreement with an assignee of the first mortgage, which provided that the assignee should apply the proceeds of standing timber, sold to him by the mortgagor, in payment of the balance due on the notes, on which interest was to cease at once; but no such application was made by the assignee, and the performance of the agreement was abandoned. *Held*, that there was no accord and satisfaction of the mortgage debt, and that interest did not cease on the notes.

The memorandum provided, in terms, that, "if said land falls short the required number of acres to amount to the sum set forth in said notes at four dollars per acre, the said notes are to be reduced in that proportion." The sum of the notes was much larger than the value of the land described in the mortgage at that price, and the measurement reduced the quantity somewhat, but it appeared that other considerations besides the land entered into the notes. *Held*, that the "sum set forth in said notes" did not mean the whole amount of the notes, but that sum included in them which represented the land at that price, which latter sum only was to be reduced.

A master, to whom the case was referred, allowed a payment to free the land from an incumbrance; a note due in five, but described as due in four, years; taxes and interest thereon; and interest on the costs of a foreclosure suit; and reckoned interest in his account according to the rule of partial payments. *Held*, that the allowances were right, and that the interest was correctly computed.

BILL IN EQUITY, filed August 25, 1879, to redeem a parcel of land in the town of Florida, in this Commonwealth, from a mortgage held by the defendant. After the former decision, reported 140 Mass. 49, the case was again heard by *W. Allen*, J., on a further report of the master and exceptions thereto, and reserved for the consideration of the full court. The facts appear in the opinion.

M. E. Couch, for the plaintiff.

A. Potter, for the defendant.

W. ALLEN, J. In May, 1869, Peter Dooley made a mortgage to one Wiley, who assigned it, on November 27, 1869, to one Ketchum, who assigned it, on August 17, 1876, to the defendant. The plaintiff holds the equity of redemption under a mortgage deed given by Peter Dooley, on August 7, 1871, to one Edmonds, and assigned by Edmonds's administrator to the plaintiff in 1878, and seeks in this suit to redeem the land from the first mortgage. The case was referred to a master to report the amount due upon the mortgage held by the defendant, and was reserved for the full court upon the master's report and exceptions thereto. We will first consider the plaintiff's exceptions in their order.

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1. The first exception is to the allowance of anything as due upon the mortgage. The mortgage, which was of land conveyed by Wiley to Dooley as part of the same transaction, was to secure the payment of six notes, one of $100, and five of $432 each, one of which was reduced by the indorsement of a payment of $260. The mortgage was delivered, but the notes were put into the hands of one Robinson, with a writing signed by the mortgagee to the effect that it was agreed by him that the notes should remain in the hands of Robinson for safe keeping, and not be used for the benefit of the mortgagee until the land should be measured, and if there was found a deficiency or an excess in quantity the notes were to be reduced or increased in proportion, and all incumbrances were to be paid, and any defects in title made good. The objection is, that the terms of the memorandum have not been complied with, and the notes have never been delivered. The land was measured, and was found to be deficient in quantity. No indorsement was made on the notes. There were some defects in the title, but they appear to have been subsequently remedied; but that is not material, because it is obvious that the terms of the memorandum were not performed, that performance was waived by the mortgagor, that the memorandum was treated by all parties as not in force, and that the notes were valid, subsisting notes. It is not necessary to consider the objection of the plaintiff, that Peter Dooley could not, as against the plaintiff, waive performance after his mortgage to Edmonds in 1871. Before that time one of the large notes had been taken up, and a payment made upon another; before that time, in November, 1869, when only the small note was due, the mortgage had been assigned by Wiley to Ketchum, under whom the defendant claims, and Peter Dooley had made an agreement with Ketchum which made no reference to the memorandum, but recognized the notes as in force, and provided for payments to be made upon them; and at that time, in the mortgage to Edmonds, under which the plaintiff claims, the mortgage is excepted from the covenants, and the amount to be paid upon it is stated.

The plaintiff also claims that there was an accord and satisfaction of the mortgage debt under the agreement between Peter Dooley and Ketchum, dated January 1, 1875, which was in sub-

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stance, so far as relates to this point, that Ketchum that day bought of Dooley a quantity of timber standing on certain land in Vermont, at a certain price per thousand feet, the amount to be thereafter ascertained, and to be sufficient to pay the balance due on the notes and mortgage, and Ketchum was to have three years in which to take off the timber. Very little timber, if any, was taken out by Ketchum under this agreement, and none was applied by him on the mortgage debt. Neither the agreement nor anything done under it extinguished or satisfied the debt.

2. The plaintiff's second exception is to the amount allowed by the master on account of the deficiency in the quantity of land. The master found the deficiency to be thirteen acres, and allowed four dollars an acre under the memorandum before referred to, which provided that, "if said land falls short the required number of acres to amount to the sum set forth in the said notes at four dollars per acre, the said notes are to be reduced in that proportion." The plaintiff contends that the notes were given only for the price of the land which was at that time conveyed by Wiley to Peter Dooley, and that the agreement is to be so construed as to reduce the notes to the sum that the land when measured would amount to at four dollars an acre. This is one construction of the language of the memorandum, and the most natural one; but it is not plain, and the subject matter and attending circumstances show that it was not the meaning of the parties.

The land lay partly in Vermont and partly in this State. The part in Vermont was fixed by the deed at 200 acres, the part in this State was said to be 250 acres more or less. It was only the land in this State which could fall short or exceed 250 acres on measurement. This makes the required number of acres in it to make up the amount of the notes, to be 365, or 115 more than was estimated and stated in the deed, and the notes and mortgage to be $468 more than the parties believed to be the whole purchase money for the land, which, it is found, they put at the price of four dollars an acre. It was found by the master, that there had been a contract between Wiley and Peter Dooley by which Wiley had agreed to convey to Dooley 800 acres of land, which included that which was conveyed; that Dooley had

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been in possession under this contract and cut off wood and timber; and that there were difficulties and litigation between them in regard to it. The indorsement of $260 on one of the notes was made at the time the deed and mortgage were delivered, but did not represent any consideration then advanced, but was the result of some arrangement between the parties which is not disclosed, and it reduced the notes to the amount of the consideration named in the deed and mortgage, $2,000. This shows what without it would be the only reasonable way of accounting for the amount of the notes, that other considerations than the price of the land entered into them. Construing the agreement in the light of these circumstances, that the parties were settling differences as well as selling and buying land, that they did include something besides the price of the land in the notes, that they estimated the quantity of land at 450 acres and fixed the price at four dollars an acre, we think that by the words "sum set forth in said notes" they did not mean the whole amount of the notes, but that sum included in them which was the price of the number of acres mentioned in the deed at four dollars an acre. This would give the result reached by the master.

3. The plaintiff's third exception is to the refusal of the master to make deductions and allowances for certain supposed defects in title. Two defects in title are specified which existed when the mortgage was given; but the master finds that both have been made good, and there is no occasion to consider whether the plaintiff could avail himself as against the defendant of a breach by Wiley of the agreement made when the mortgage was given.

It is argued that the conveyance by Ketchum to Wiley of the twenty-five acres of the Johnson lot, so called, being a portion of the land in Vermont, was made after the land had been diminished in value by the cutting off of timber by Ketchum, and that the plaintiff cannot be required to accept that reconveyance as making good the title. The title to the land was made good by the deed to Wiley, and it was held under the mortgage, and the title to it was made absolute in the defendant by the foreclosure in Vermont, and its value was properly allowed by the master as part of the value of the land in Vermont. Whether any timber was cut from it by Ketchum under his paramount

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title under such circumstances as would make the allowance of its value upon the mortgage debt proper, and what amount, if any, was so cut, and whether any right there may have been to a reduction of the debt on that account was waived by Peter Dooley, we need not consider; no exception was taken to any finding or action of the master in that respect.

4. The plaintiff's fourth exception is to the allowance of two of the notes, on the ground that they are not correctly described in the mortgage. The only discrepancy which appears is, that the note payable in five years from its date is described in the mortgage as payable in four years; that is, the mortgage describes two notes payable in four years, instead of one payable in four years and one in five years. The note payable in five years is the one on which the $260 was indorsed at the time the mortgage was given. The master properly treated the amount due on it as due on the mortgage.

5. The exception to the allowance for payment of taxes, and of interest on such payment, must be overruled.

6. The sixth exception is to the allowance of any interest on the notes after January 1, 1875, on the ground that, by the agreement of that date between Ketchum and Peter Dooley, interest on the notes was to stop at that time. The words relating to interest on the notes are, "the interest on the forementioned notes at the date of this instrument per agreement is to stop." This agreement has already been adverted to in considering the first exception. Besides giving to Ketchum the right to cut timber on land of Dooley in Vermont, to apply on the mortgage notes, it gave him the right to cut a certain quantity of timber on the mortgaged premises in this State. One Arnold held a deed of the land in this State at the time of the mortgage, as security for a note of Wiley's, and Ketchum had paid him and taken a quitclaim deed of the land from him. By the agreement, Ketchum agreed to quitclaim this land to Peter Dooley. The whole agreement was in the form of a sale of timber standing in Vermont in sufficient quantity to pay the mortgage debt, to be cut and removed within three years, and of a certain quantity of timber standing in this State, at a fixed price, which was equal to the amount Ketchum had paid to Arnold, and Ketchum was to extinguish any claim under Arnold's deed by quitclaim-

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ing to Peter Dooley. Under this agreement Ketchum cut off about the amount of timber he was authorized to cut on the Massachusetts land, but a little less. The master finds that some of it, but he cannot tell how much, was cut from the land in Vermont. All that was cut was applied by Ketchum to reimburse himself for the money he had paid to Arnold. It was not an executed sale of the timber in Vermont, and Ketchum's right to cut it was limited to three years. Nothing was ever done under the part of the contract that related to the mortgage notes; no payment was made on the notes by Ketchum, and he did not give the quitclaim to Dooley. All that was done under the whole agreement was, that Ketchum cut off the timber to repay himself what he had paid to Arnold; he gave a quitclaim of the right he had from Arnold, not to Peter Dooley, but to the defendant when he became assignee of the mortgage which Ketchum held, which this bill is brought to redeem. The agreement so far as related to that mortgage was never acted on by the parties, and was wholly abandoned by them. The agreement as to interest on the notes fell with the rest.

7. The seventh exception is to the allowance of interest on the costs of the foreclosure suit in Vermont. The same mortgage covered lands in Vermont, and the plaintiff obtained a decree of foreclosure in that State. The decree was entered on December 22, 1883, fixed the amount due on the mortgage and the costs of suit, and required payment of those sums and interest by a fixed day, or the right of redemption would be foreclosed. The payment was not made, and the foreclosure was completed. In fixing the value of the land to be applied to the mortgage debt, the master deducted from its full value the amount of the costs, with interest from the date of the decree until the foreclosure was perfected. The objection is to the allowance of the interest. We think this was right. The amount of the costs when the mortgage was foreclosed should be deducted from the value of the land, to ascertain the amount that was applicable to the debt, and that, by the terms of the decree, included interest from the date of the decree.

8. The eighth exception is to the application to the Arnold mortgage of the value of the timber cut by Ketchum, as stated under the sixth exception. The application to the Arnold mort-

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gage was made by Ketchum. The master applied the value of the timber cut by Ketchum to the defendant's mortgage.

The defendant's exception to the refusal of the master to allow annual interest must be overruled. His other exceptions become immaterial. *Exceptions of both parties overruled.*

CLARENCE A. HADDOCK, executor, *vs.* BOSTON AND MAINE RAILROAD.

Essex. January 28, 1888. — February 29, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, & KNOWLTON, JJ.

Will — Probate — Limitation — Evidence.

A will devising lands may be admitted to probate at any time after the death of the testator.

A woman, whose husband was reputed to have died soon after their marriage, and to whom a deed of land, describing her as "Sarah P., widow," was given in 1801, made a will devising the same land in 1807, as "Sarah P.," without more, and died in 1822, the will being probated in 1885. *Held*, that the fact that she made the will was competent evidence of her legal capacity.

APPEAL by the Boston and Maine Railroad from a decree of the Probate Court, entered November 16, 1885, allowing the will of Sarah Pendergast, formerly of Haverhill, who died in 1822.

Trial in this court before *Morton*, C. J., who reported the case for the consideration of the full court, which, so far as material, is as follows:

The executor claimed that the appellant had no right to appeal from the probate of the will; but it was agreed that the title of the appellant to real estate devised by the will might be affected by the establishment of rights under the will if it was admitted to probate, and the judge ruled that the appellant had the right to appeal.

The following issue among others was submitted to the jury: "4. Was Sarah Pendergast a married woman, having a lawful husband alive at the time of the execution of said will?" The executor offered in evidence the writing propounded for probate as the will of Sarah Pendergast, which was delivered to him in

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1884, having been found among papers in the possession of one of her heirs, and which, so far as material, was as follows: "I, Sarah Pendergast, of Haverhill, in the county of Essex and Commonwealth of Massachusetts, being of sound mind, memory, and understanding, do make, publish, and declare this my last will and testament, in manner following: . . . . 1. I give, devise, and bequeath unto my grandson, Samuel Frink, Jr., and his heirs and assigns forever, all my real estate, consisting of a small lot of land situate in said Haverhill, with a small dwelling-house and barn on the same; and in case the said Samuel Frink, Jr., shall decease in my lifetime, I will that my daughter Elizabeth Frink shall have, hold, and enjoy the aforesaid real estate, and at her decease to be equally divided between her children. . . . . In witness whereof I have hereunto set my hand and seal this thirty-first day of October, in the year of our Lord one thousand eight hundred and seven. Sarah Pendergast. [Seal.]"

It appeared that in 1859 one of the heirs of Sarah Pendergast brought suit against the appellant to recover possession of a portion of the land devised by the will, and the executor offered in evidence a deed from Mary Ayer to "Sarah Pendergrass, of Haverhill aforesaid, widow," dated December 25, 1801, and duly recorded, which purported to convey the premises claimed by the demandant in that suit, together with testimony tending to show that the deed was found with the file of court papers in that case. The appellant objected to the admission of this deed; but the judge admitted it, on the ground that the recitals contained in it, and the fact that the grantee received it, and acted under it, had a bearing upon the question whether the husband of Sarah Pendergast, as it was conceded that she had been previously married, was living when she executed the paper purporting to be her will. There was also evidence tending to show that the tradition and repute in the family were that Pendergast died soon after his marriage.

The appellant requested the judge to make the following rulings: "1. That, as matter of law, the paper offered could not be admitted to probate as a will, by reason of the lapse of time since it purported to have been executed, and the death of the testatrix. 3. That upon the evidence the jury would not be authorized to find that Sarah Pendergast was a widow at the

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time of the execution of the instrument propounded. 4. That, in determining whether or not Sarah Pendergast was a widow when she executed said instrument, the jury would have no right to consider the fact that she executed a paper purporting to be a will as evidence that she had legal capacity to execute a will devising land."

The judge declined so to rule; the appellant excepted to such refusal; and the judge submitted the issue to the jury, under instructions not otherwise excepted to.

If the rulings and refusals to rule, made under the exception of the appellant, were incorrect, another trial of the issues was to be had; if otherwise, the case was to stand for further proceedings in this court.

S. Lincoln, for the appellant. 1. To the opinion of the court in *Shumway* v. *Holbrook*, 1 Pick. 117, the reporter has appended the following note: "Mr. Justice Jackson, at the argument, said that there was a case in the county of Essex perhaps thirty years ago, where it was found that the widow of a testator must hold land under the will which had not been proved. The will was therefore carried to the probate office, but, more than twenty years being elapsed since the death of the testator, the judge of probate refused to allow it; but upon an appeal the decision was reversed, as a will must be proved and allowed in order to convey land."

The case in Essex referred to by Mr. Justice Jackson was, without doubt, the case of *Bourne* v. *Greenleaf*. An examination of the papers on file in the Probate Court and in the Supreme Judicial Court confirms this belief, because the facts there disclosed appear to conform to Mr. Justice Jackson's statement of them. This was also the opinion of Mr. Justice Gray, as stated in *Waters* v. *Stickney*, 12 Allen, 13.

The papers on file in *Bourne* v. *Greenleaf* show that a paper purporting to be the will of Thomas Beck, bearing date August 1, 1765, was offered for probate to the Probate Court of Essex County on December 7, 1801, by Joseph Buckley, attorney to Deborah Bourne, who recites in her petition that she is a sister and one of the heirs of Frances Beck, deceased, who was named in the will of Thomas Beck as his widow and executrix. Her petition does not state the date of the death of Thomas Beck, nor of the death of Frances Beck. It prays the court "to pro-

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ceed to hear and examine the witnesses whose names are subscribed to said will, and to prove and allow the same in due form of law." Upon the same day the court decided as follows: "I do not consider myself authorized by law to make any order or decree on the instrument above mentioned, and therefore do not grant the above request"; and Deborah Bourne claimed an appeal from the decision, which was duly entered in the Supreme Judicial Court. One of her reasons of appeal was as follows: "*Third.* That the said judge was fully authorized by law to proceed to hear and examine the said subscribing witnesses, and upon such examination to prove, approve, and allow the said instrument as the last will and testament of the said Thomas Beck." The appeal was duly heard by the Supreme Judicial Court at a term beginning November 9, 1802, and the court admitted the will to probate. The record contains this simple statement, but no reasons for the decree are given. The members of the court who held the term were the "Honble Theodore Sedgwick, Esq., Samuel Sewall, Esq., George Thatcher, Esq., Justices."

Among the papers on file in the probate office at Salem is a letter bearing date January 5, 1801, addressed to the judge of probate by Abner Greenleaf, asking that notice be given to the heirs of Thomas Beck in case any instrument purporting to be his last will should be presented for probate, "as there are several reasons which the said heirs will give against proving that will at this late hour." There is also another paper on file in the probate office, without signature and without date, which begins as follows: "May it please your honour, I have objections as follows: 1st. Because the executrix is dead, and she lived upwards of thirty years after the death of the testator and never offered this will for probate; now, may it please your honour, as the executrix is dead, I wish to know by what authority Mr. Hinkley offers this will for probate. No administration shall be granted, says the law, on any estate after thirty years, &c., and how can a will be proved after upwards of thirty years, and an administration granted with the will annexed?" &c. It does not appear that this paper was ever presented to the appellate court. The handwriting indicates that it was probably written by the same hand which wrote the paper above mentioned signed Abner Greenleaf. Unless this unsigned manu-

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script be held to exhibit the facts of this case, there is no evidence to show how long it was after the testator's death when his will was admitted to probate.

In *Shumway* v. *Holbrook*, 1 Pick. 117, the court says, "If a will can be found, it may be proved in the probate office at any time, in order to establish a title to real estate." The case does not decide this point, however, but merely that a will of which there has been no probate cannot be admitted in evidence; and the words quoted are *obiter dicta*.

In *Waters* v. *Stickney*, 12 Allen, 13, Mr. Justice Gray says, "It has been directly adjudged by this court that a will may be proved even thirty years after the death of the testator," &c.; and cites as authority *Bourne* v. *Greenleaf* and *Shumway* v. *Holbrook*. In this case, again, the only point decided material to the present discussion is that a codicil may be admitted to probate fourteen years after the maker's death, and the words quoted above are again *obiter dicta*.

The cases of *Bourne* v. *Greenleaf*, *Shumway* v. *Holbrook*, and *Waters* v. *Stickney* are all the cases decided in Massachusetts which touch the question under consideration, and they all rest upon the narrow foundation of *Bourne* v. *Greenleaf*, and in that case the essential facts are not authenticated, nor is it clear to what extent the matter of the alleged lapse of time was brought to the attention of the court, or was argued before it or considered by it.

After a lapse of more than eighty-five years since *Bourne* v. *Greenleaf* was decided, and when so little appears upon the record, the case cannot be regarded as one of controlling authority; and at most, neither this case nor either of the others which follow and depend upon it, is authority for the proposition that a will can be admitted to probate more than thirty years after the death of the maker.

2. The jury should have been instructed that, in determining the question whether or not, when Sarah Pendergast executed the paper purporting to be a will, she had legal capacity to make a will devising land, they had no right to consider as evidence of such capacity the fact that she executed the paper. The appellant submits that no presumption of any sort arises, and that the jury should have been instructed that the fact that

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a paper was executed had no tendency to show that its maker had legal capacity to execute it.

B. F. Butler & P. Webster, for the executor.

DEVENS, J. The first question discussed by the appellant is whether the Probate Court has authority, as matter of law, to admit a will to probate sixty-three years after the death of the testator, and incidentally whether there is any limit of time after the death of the testator subsequent to which the court has no such authority.

In *Shumway* v. *Holbrook*, 1 Pick. 115, 117, the question was whether a will not admitted to probate was admissible in evidence. It was held that it was not, but it is said: "If a will can be found, it may be proved in the Probate Court at any time, in order to establish a title to real estate. It differs from an administration of personal property, which cannot be originally granted upon the estate of any person after twenty years from his decease." In the course of the argument Mr. Justice Jackson alluded to a case in Essex County perhaps thirty years before, where it was found that a widow "must hold land under the will which had not been proved." The will having been offered for probate, the judge of probate declined to allow it, as more than twenty years had elapsed since the death of the testator, and on appeal his decision was reversed and the will admitted to probate. The research of the counsel for the defendant has established that the case thus alluded to was that of *Bourne* v. *Greenleaf*, Essex, 1802; *S. C.* cited 1 Pick. 117, note; and has supplied us with as satisfactory an account of it, drawn from the papers on file, as they will afford. It is a case to which some weight must be attached, as it brought into question directly the authority of the Court of Probate, and the appeal was to the full bench of the Supreme Court, which reversed the original decree. While no opinion appears to have been written, it could not but have been a carefully considered case, as it reversed the opinion of the judge of probate as to the extent of his jurisdiction. The will thus admitted to probate was so admitted thirty-six or thirty-seven years after its date. How long after the death of the testator does not clearly appear, although some of the papers found indicate that it was more than thirty years after.

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In *Marcy* v. *Marcy*, 6 Met. 360, 370, the question was whether there was sufficient evidence that a will which became operative forty-three years before had been admitted to probate so that it could be read in evidence. The court held that there was such evidence, adding, "On evidence like the present, it would be the duty of the Probate Court to establish the will, if, for want of form, the probate should have been considered so defective that the will had been rejected as evidence in its present state."

In *Waters* v. *Stickney*, 12 Allen, 1, where it was held that the Probate Court, fourteen years after admitting a will to probate, might admit to probate a codicil written upon the same leaf, which had escaped attention and was not passed upon at the time of the probate of the original will, it is said by Mr. Justice Gray, citing the above cases, "It has been directly adjudged by this court that a will may be proved even thirty years after the death of the testator, although original administration could not by statute be granted after twenty years"; and again, "If no will had been proved, the lapse of time would not prevent both will and codicil from being proved now."

While it is true that in neither of these cases has it been decided that a will disposing of lands can be admitted to probate after sixty years, yet there is no suggestion in any of them that there is any limitation of time to such proof, and the language used is quite explicit to the contrary. In view of the decisions made, and the repeated expressions directly relevant to the cases considered used in argument by judges of this court, we cannot treat this inquiry, as the defendant desires we should, as practically a new question. We must deem it one that has been fairly passed upon and decided.

It may be that the inconveniences which might arise from the probate of a will many years after the death of the testator are such that a statute limiting the period might be properly enacted. That course has in some States been adopted. Conn. Gen. Sts. 1875, tit. 18, c. 11, § 11. Maine Rev. Sts. c. 64, § 1. But statutes of limitation are arbitrary, and the considerations which apply to positive laws of this character are legislative rather than judicial. In every instance where a great length of time has elapsed after the death of a testator, possessory titles may have been acquired which will prevail against the record. What is due to

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the just rights of the devisees is to be considered with reference to other rights of property, or to the repose of the community, but such considerations belong to the domain of legislation.

So long as one can produce the evidence necessary to obtain the probate of a will, we can see no legal reason why one who relies upon it should not be allowed to prove it as he would be permitted to prove a deed, however ancient, under which he claimed title. The fact that he could not offer in evidence a will not admitted to probate, as he might an ancient deed, would certainly afford no reason why its authenticity should not be established in the Probate Court by its regular course of procedure.

The appellant further contended that the jury ought not to have been allowed, in determining the question whether the testatrix was a widow and thus competent to make a will as the law stood in 1807, to consider the fact that she actually executed a paper purporting to be a will devising land as any evidence that she had legal capacity so to do. This fact, in connection with the other facts proved, was competent to be considered. There was no ruling that alone it would have been sufficient to establish her legal capacity, that is, that she was at the time a widow. There was evidence of reputation that the husband of the testatrix died soon after their marriage; that a deed was made to her on December 21, 1801, of the very land which she undertook to dispose of by will, in which she was described as "Sarah Pendergrass, widow," which deed was found among her papers; and that she executed the will by the same name as that recited in the deed in which she was described as widow, although that word is not appended to her name in the will. The act done by her of disposing, or assuming to dispose, of her property, which she could only lawfully do if a widow, was an assertion of her status, and thus of her legal capacity, made in an important transaction, which might properly have been considered in connection with the other evidence.

The conclusion we have reached renders it unnecessary to decide whether the appellant was lawfully entitled to appeal. Other exceptions taken by it were waived in this court.

Cause to stand for further proceedings.

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PATRICK DONNELLY *vs.* BOSTON CATHOLIC CEMETERY ASSOCIATION.

Suffolk. November 15, 1887. — February 29, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Public Charity — Cemetery Corporation — Negligence.

A cemetery corporation, which voluntarily uses its funds for objects akin to the purposes of its organization, is not a public charity, but is liable to the proprietor of a grave for the negligent burial of a stranger therein.

TORT for negligently burying the body of a stranger in a grave belonging to the plaintiff. Trial in the Superior Court, before *Aldrich*, J., who ordered a verdict for the defendant, and reported the case for the determination of this court as follows:

It appeared that the defendant was specially incorporated by the St. of 1851, c. 292, "for the purpose of establishing and perpetuating a place for the burial of the dead," subject to the St. of 1841, c. 114,* and by subsequent legislation was author-

* The sections material to this case are as follows:

"Section 3. Every such corporation may take and hold, by purchase or otherwise, so much real and personal estate as may be necessary for the objects of their organization; and all such real and personal estate shall be applied exclusively to purposes connected with, and appropriate to, the objects of such organization.

"Section 4. Every such corporation shall have authority to lay out the real estate which they may hold in suitable lots or subdivisions, and to grant and convey to any person or persons the sole and exclusive right of burial, and of erecting tombs or cenotaphs, in any such designated lot or subdivision, and of ornamenting the same, upon such terms and conditions, and subject to such regulations as said corporation shall prescribe.

"Section 5. The lots in said cemetery which may be granted as aforesaid shall be held indivisible, and upon the decease of any proprietor, the heirs at law or devisees of such proprietor, as the case may be, shall be entitled to all the privileges of membership; provided, however, that if there be more than one heir or devisee of any lot, they shall be held to give in writing, within nine months from the decease of such proprietor, to the clerk of said corporation, which of said heirs or devisees shall represent said lot; and in case said heirs or devisees shall fail so to do, the board of trustees shall enter of record which of said heirs or devisees shall represent said lot, and vote at the meetings of said corporation, until said heirs or devisees shall designate as aforesaid."

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ized to hold real and personal estate for the purposes for which it was established to the amount of $132,500; that it had no capital stock, issued no certificates of shares, and paid no dividends or any profits; that no member of the corporation, by virtue of his membership, received any pecuniary benefit whatever from the association; that all of the money received by the corporation, whether from the sale of graves or otherwise, was exclusively used for ornamenting the grounds, burying the poor, giving graves to public institutions, and carrying out the purposes for which the corporation was formed; that when persons died without leaving sufficient funds for burial, the corporation gave graves, and furnished the coffin and hearse, and in case of the death of any of the inmates of public and charitable institutions, the graves were, upon application, furnished for nothing; and that this had been the character and course of the association from its organization.

The plaintiff, in 1878, purchased a grave from the defendant for seven dollars, the deed of which entitled him and his heirs and assigns to the grave as a place of burial, and contained the following conditions: "that said lot shall not be transferred without the consent of the trustees; shall be subject to the regulations made, or to be made, in the care and management of said cemetery by the trustees, who shall also have the right to prevent the erection of any offensive or improper monument or inscription thereon; and shall retain the right to enter any lot or lots for the removal of anything objectionable; that no remains shall be deposited therein for hire; and that persons dying in drunkenness, duel, or by self-destruction, unbaptized, non-Catholics, or otherwise opposed to the Catholic Church, shall not be there interred."

The plaintiff had successively buried his father and one of his children in this grave, and in March, 1884, brought the remains of his wife for interment in the same grave. Upon the arrival of the funeral procession at the grave, there appeared upon the side of the grave, which had previously been opened by a gravedigger in the employ of the corporation, two small coffins, one of which bore the name of John McDonald. The plaintiff testified that no John McDonald had ever been buried in his grave with his consent, and offered testimony tending to show that

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this body of John McDonald, and the coffin containing the same, had been negligently buried by the employees of the corporation in his grave. Among other testimony thus put in by the plaintiff, he offered evidence to show that, at the time of the burial of his wife, there were in the possession of the defendant no books of record which would enable its officers (independently of an actual examination of the grave, or a search through the day-book of daily interments since the purchase of the grave) to determine in all cases, without considerable delay, who might be buried in any specified single grave, and that there were not, at the time of the burial of the plaintiff's wife, any regulations or orders of the corporation requiring or directing the keeping of such records.

The defendant contended, and offered testimony to show, that the coffin and body of John McDonald had never been buried in the plaintiff's grave, or if so buried such burial was not made by any person for whom the defendant was responsible.

No claim was made or evidence offered by the plaintiff that there was any negligence in the employment or selection by the corporation of the grave-digger above referred to, or any of its servants or employees. There was evidence tending to show that some sixty thousand bodies were buried in the cemetery of the defendant at the time of the trial; and it also appeared that the agent or superintendent of the corporation who had charge of the cemetery received a salary of $300 per annum, and that the grave-diggers, who were employed by him, also received pay for their services from the corporation. It also appeared, that when a grave had been sold, and the same was subsequently opened at the request of the owner for the purpose of a fresh interment, a charge of three dollars was made by the corporation for such opening; which sum, however, was devoted, with the other receipts of the corporation, to carrying out the general purposes of the corporation, as above stated.

If the ruling of the judge was correct, judgment was to be entered on the verdict; if the ruling was incorrect, judgment was to be entered for the plaintiff, by agreement of parties, in the sum of $250.

J. L. Eldridge, for the plaintiff.

C. L. B. Whitney, for the defendant.

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HOLMES, J. There was evidence warranting a verdict for the plaintiff if the defendant was subject to the ordinary rules of liability. We are of opinion that it was subject to those rules, and that by the terms of the report judgment must be entered for the plaintiff. *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432, was decided on the ground that the defendant was a public charitable institution under the laws of the Commonwealth, and *Benton* v. *Trustees of Boston City Hospital*, 140 Mass. 13, on the ground that, if it was not within the former decision, then the defendant was a mere agent to perform a duty which the city of Boston had assumed solely for the benefit of the public, under the authority of a statute; that the city of Boston would not be liable under the rules peculiar to municipal corporations stated in *Tindley* v. *Salem*, 137 Mass. 171, and *Hill* v. *Boston*, 122 Mass. 344; and that therefore a mere statutory agent without property intervening between the city and the actual wrongdoer was also free from liability.

The latter ground has no application here. There is no pretence that the defendant is acting as an agent for the city. We think that there is equally little ground for calling it a charitable corporation. Assuming for the sake of argument that it would have no right to declare dividends to its members in case of realizing profits, there is nothing in the charter which compels the application of any part of its funds to charitable uses. It would be acting strictly within its powers if it sold all its lands for full price. The purpose of the charter is to secure permanent care of graves, and such advantages to the persons interested as may be deemed incident to burial in such a cemetery. The beneficiaries are a definite number of persons clearly pointed out by law. St. 1841, c. 114, §§ 4, 5. *Old South Society* v. *Crocker*, 119 Mass. 1, 23. See *Evergreen Cemetery Association* v. *Beecher*, 53 Conn. 551; *Matter of Deansville Cemetery Association*, 66 N. Y. 569.

The provision in the St. of 1841, c. 114, § 8, that all the real and personal estate of the corporation "shall be applied exclusively to purposes connected with, and appropriate to, the objects of such organization," does not mean to exempt its property, and thus the corporation, from ordinary civil liabilities. There is a similar restriction, express or implied, in the case of a railroad.

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The fact that the funds received were actually applied to a considerable extent in charity, is no more material than evidence of a similar application of a part of his income by a private citizen would be, in a suit against him.

Judgment for plaintiff.

CHARLES ROBINSON & another, administrators, *vs.* GEORGE W. SIMMONS & others.

Suffolk. November 17, 18, 1887. — February 29, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Partnership — Surviving Partners — Distribution of Profits — Equity Practice.

The representatives of a deceased partner, whose capital is used by the surviving partner in the business, may generally, if there is no agreement, elect to demand either interest on such capital or the profits earned by its use.

A surviving partner, who in good faith continues to use in the business his deceased partner's capital with the consent of a majority of his heirs, is entitled to compensation for his skill and services out of the profits earned by it; and the latter's representatives will take only such profits as then remain.

The surviving partners in a manufacturing firm paid the debts of a deceased partner out of the firm assets, and continued to use in the business his share of the capital, which consisted largely of goods in process of manufacture, with the consent of the majority of his heirs but against the protest of the minority, and realized large profits. Subsequently, the majority agreed that their shares of the capital might remain in the business at a certain rate of interest, and the minority were paid a sum on account of their shares. *Held*, on a bill in equity for an accounting, that the debts so paid should go in reduction of the deceased partner's capital, and that the balance due the minority after the payment on account should be paid with interest at the rate agreed on by the majority.

On a bill in equity by administrators against the surviving partners and all the heirs of the intestate, the object of which is to ascertain a sum due from the partners to a minority of the heirs, this court will order payment of such sum to be made directly to the latter.

BILL IN EQUITY, filed March 25, 1884, by two of the administrators of the estate of George W. Simmons against the surviving partners of the firm of George W. Simmons and Son, one of whom was the remaining administrator, for an account and for the recovery of an amount due the estate. On January 29, 1887, the bill was amended so as to make the surviving children

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of said Simmons, and the representatives of his widow and of a deceased child, parties defendant. The case was referred to a master, whose report, so far as material, is as follows:

On February 1, 1869, George W. Simmons, who had been engaged for many years in the business of manufacturing and selling clothing at "Oak Hall," so called, numbered 32 and 34 North Street, in Boston, formed a copartnership with his son, George W. Simmons, junior, and Philip A. Spofford. By the terms of the partnership, George W. Simmons was to receive eighty-two per cent of the profits, George W. Simmons, junior, ten per cent, and Philip A. Spofford eight per cent of the same; and this arrangement continued until the death of George W. Simmons, except that his share of the profits was from time to time reduced, and the share of the profits of George W. Simmons, junior, was correspondingly increased.

George W. Simmons died, intestate, on December 14, 1882, leaving a widow and seven children. The balance of capital to his credit on that day was $66,480.10; to the credit of the defendant Simmons, $9,584.29; and to the defendant Spofford, $5,203.29; making a total capital of $81,267.48. The widow was entitled to one third of her husband's interest, and the children, including the defendant Simmons, were entitled to the remaining two thirds.

Immediately after the death of George W. Simmons an account of stock was taken by the firm, and on December 20, 1882, the defendants Simmons and Spofford formed a new copartnership under the firm name of G. W. Simmons & Co., by the terms of which the former was to receive ninety-two per cent of the profits and the latter eight per cent of the same. The new firm paid the liabilities, and began business at the same place with the stock and assets of the old firm, and without any new capital, and have continued to do a profitable business. No consent was given by Virginia A. Beals, Edith W. Beals, or Frances A. Henshaw, three married daughters of George W. Simmons, or by the representative of the last named daughter and her children, to such use and appropriation of the stock and assets of the old firm, and they always objected thereto; but the same was concurred in by the widow and the other three children, besides the defendant Simmons. The heirs were not

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able to agree upon the appointment of administrators upon the estate, and the Probate Court, on February 5, 1883, appointed two administrators, of whom the defendant Simmons was one. From this decree an appeal was taken, and in November, 1883, the plaintiffs and the defendant Simmons were appointed administrators by the Supreme Judicial Court.

On September 1, 1883, the widow and the three children last named executed the following writing: "The undersigned desire, and do hereby give their consent, that their respective shares in the interest of G. W. Simmons (deceased) in the firm of G. W. Simmons and Son, Oak Hall, shall remain in the business as at present conducted by G. W. Simmons and P. Augustus Spofford under the name of G. W. Simmons & Co. for a period of three years; simple interest to be paid reckoned at rate of seven (7) per cent yearly, — payable quarterly or monthly if desired."

On August 27, 1883, the surviving partners paid to two of the heirs, and to the representative of the third, who had not consented to the use by the firm of their interests in the estate, the sum of $20,000, taking the following receipt therefor: "Boston, August 25, 1883. Received of George W. Simmons and T. Augustus Spofford, surviving partners of the firm of George W. Simmons and Son, the sum of ($20,000) twenty thousand dollars, the same to be accounted for in settlement of the estate of George W. Simmons, deceased, as received on account of our respective shares in his interest in the firm of George W. Simmons and Son, and which to that extent shall be discharge of the liability of the surviving partners to us as heirs of said deceased, directly or through administrators. This receipt is executed without prejudice to our further claims on said surviving partners, whether through administrators or otherwise, and is strictly limited to the business and assets of Oak Hall." Before and after this payment the defendants Simmons and Spofford expressed a willingness to pay to the parties to this receipt the whole amount to which they were entitled, but without offering any specific sum or rendering any account whereby it could be ascertained. The parties could never agree as to the methods of ascertaining, or as to the persons by whom such amount should be ascertained, but said defendants were willing to have the books examined by an expert who should be

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suggested by the parties seeking the examination. No person to act as such expert was suggested, though requested by said defendants. Offers were made to have the amount determined by arbitration, but no names for arbitrators were ever suggested or agreed upon; and said defendants were active in urging and procuring the bringing of the present suit, as the only means of fixing the amount of their liability.

Among the individual debts of George W. Simmons, deceased, was a subscription of $5,000 to the stock of a new corporation called the Craighead and Kintz Manufacturing Company, and a note amounting with interest to $13,433.33, secured by mortgage of real estate at Ballardvale. The subscription of $5,000 was paid on May 4, 1883, by the defendant Simmons, out of the assets of the firm, under a written agreement, dated April 27, 1883, and signed by the widow and the surviving children, and the representative of the deceased daughter and her children, which provided that the subscription might be "paid out of any personal assets of the estate of said George W. Simmons, deceased, the widow and each of the heirs to bear their proper proportion of the payment. They also agree that said sum of five thousand dollars so to be paid shall be considered as so much personal estate taken out of the estate subject to administration, and that they will protect each other if any contingency shall arise requiring the widow and heirs of said George W. to make restitution to the administrators when appointed. The purpose of this agreement is to enable said corporation to get in all its capital, and to provide for the five thousand dollars subscribed by said George W., payment of which could not now be enforced, but which we are willing to pay according to our several interests and liability (if any exists), and so to take so much of the personal assets out of the administration." The mortgage note was paid in the same manner, on December 7, 1883, under an agreement, which was dated June 21, 1883, and signed by the same persons, and was as follows: "The undersigned hereby request Geo. W. Simmons to pay — out of any available assets of the estate of Geo. W. Simmons, deceased — the mortgage on the Ballardvale real estate, the amount of the mortgage to be allowed him in his settlement with the administrators of the estate when appointed."

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Among the assets of the estate in the possession of the defendant Simmons were fifteen St. Paul and Sioux City bonds of one thousand dollars each. These bonds were sold by brokers in New York, employed for that purpose by the defendant Simmons when the market reached prices satisfactory to him, and the proceeds, with interest and coupons, amounting to $18,807.64, were paid over to the defendant Simmons by the brokers, in one payment by check, in February, 1885. This check was delivered by him to the plaintiff Robinson, who gave a receipt therefor, dated February 11, 1885, and held the proceeds as a part of the estate in his hands. The defendant Simmons, when he began to sell these bonds, intended to apply the proceeds to the Craighead and Kintz subscription and the Ballardvale mortgage, and ordered them to be sold for that purpose, but at the time of the payment of the subscription, on May 4, 1883, none of the bonds had been sold; and at the time of the payment of the mortgage, on December 7, 1883, three bonds only had been sold, realizing $3,436.25, in the hands of the brokers. The other debts of the estate have been paid, the payments being largely made by the defendant Simmons out of the assets of the new firm. The amount so paid before the appointment of administrators was $11,792.45, and that paid subsequent to such appointment was $25,041.18; the balance of $14,607.85 over and above the mortgage being made up principally of interest on mortgage notes of George W. Simmons, deceased. The defendant Simmons collected the rents of the real estate, and paid the taxes and other expenses thereon. The net income received by him from the real estate up to February 1, 1885, was $15,448.95, which sum was paid into the general fund of the new firm, and was credited on their books to the estate of George W. Simmons, to which account also were charged all the disbursements and other expenses on account of the real estate.

The master found that at the death of George W. Simmons a considerable portion of the stock then on hand was partially manufactured clothing, and that the only way to realize the fair or substantial value of such goods was to deal with it as the defendants did, by completing the garments, adding new materials, and disposing of them at retail; that if the unfinished clothing had been sold, either in large or small lots, in the condition in

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which it was on December 14, 1882, a small percentage only of its cost could have been realized; that the manner in which the defendants dealt with the whole stock was necessary in order to obtain its full value; that if any allowance was to be made to the defendants for their skill and services in realizing the full value of the whole stock, such allowance would be equal to twenty per cent of the profits, to be deducted from the share of George W. Simmons, deceased; and that, if profits were to be allowed to the estate of George W. Simmons and to the defendants in proportion to the amounts of capital standing to their several credits, and without regard to the share of profits which the parties were severally receiving at his death, the value of the services of the defendants in earning them was forty per cent of such profits; and reserved for the decision of the court the rule for the measure of the liability of the surviving partners, upon the facts stated in his report.

Hearing before *Devens*, J., who reserved the case for the consideration of the full court.

R. M. Morse, Jr., for the plaintiffs.

I. In ascertaining the share of the deceased, the surviving partners must not only bring into account the assets of the firm which actually existed at the time of his death, but also whatever has been obtained by the employment of these assets up to the time of the closing of the account; for so long as profits are made by the employment of the capital of the deceased partner, so long must such profits be accounted for by the surviving partners. 2 Lindl. Part. 1046. *Crawshay* v. *Collins*, 15 Ves. 218. *Yates* v. *Finn*, 18 Ch. D. 839. *Washburn* v. *Goodman*, 17 Pick. 519. *Townend* v. *Townend*, 1 Giff. 201. *Goodburn* v. *Stevens*, 1 Md. Ch. 420; *S. C.* 5 Gill, 1. *Brown's Appeal*, 89 Penn. St. 139. *Forrester* v. *Oliver*, 1 Bradw. 259. *Skidmore* v. *Collier*, 8 Hun, 50. *Cook* v. *Collingridge*, Jacob, 607.

The defendants Simmons and Spofford contend that, conceding the rule above stated to be correct, they are not to be charged with the $66,480.10, standing to the credit of George W. Simmons at his death, but certain payments are to be deducted therefrom. The entire amount of these payments is not to be applied to the reduction of the capital, because they were not made to the administrators, or at their request, but

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should be treated as debits to the estate in the account which said defendants have opened with it. At the most, they cannot have any greater allowance than for the difference between the amounts so paid and the amounts received by them for rents.

II. The surviving partners are not entitled to compensation for their services in carrying on the business. 1. Because they were bound to deal with the stock in such manner as in the exercise of reasonable diligence would produce the most money. 2. Because, if under any circumstances surviving partners might be allowed compensation, they are not entitled to it where they have wilfully, against the objection of parties interested in the estate, undertaken to pervert the trust in their hands, and to use the firm assets for their private benefit. 3. Because the defendant Simmons, who would receive $\frac{92}{100}$ of the compensation, is an administrator, as well as surviving partner.

The general rule is, that surviving partners are not entitled to compensation. *Dunlap* v. *Watson*, 124 Mass. 305. *Beatty* v. *Wray*, 19 Penn. St. 516. *Brown* v. *McFarland*, 41 Penn. St. 129. *Washburn* v. *Goodman*, 17 Pick. 519. *Brown's Appeal*, 89 Penn. St. 139. It has been allowed only in exceptional cases: where the surviving partner, with the consent of the representative of the deceased partner, carried on the business of completing important contracts with the government during the war for the manufacture of cannon under patents, *Schenkl* v. *Dana*, 118 Mass. 236; where the surviving partner carried on the business under a claim of right to buy the business by the terms of the partnership agreement, *Yates* v. *Finn*, 13 Ch. D. 839; where at the time of the death of the deceased partner the firm was insolvent, and was rendered solvent by the credit and connections of the surviving partners, *Wedderburn* v. *Wedderburn*, 2 Keen, 722; *S. C.* 4 Myl. & Cr. 41, and 22 Beav. 84.

But there is a clear distinction between all of these cases and the case at bar. No peculiar skill or service was required in making up a lot of unfinished clothing, and in selling out the stock at retail. It was the obvious and proper thing to do. It must fairly have been within the contemplation of the partners, as the best method for winding up the business whenever a dissolution should come. The fact that the defendant Simmons is administrator, and as such entitled to compensation, is a suffi-

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cient reason why no compensation should be allowed him as surviving partner. To allow compensation to him in the latter capacity would make it for his interest to prolong the settlement of the estate, and to use it for his private benefit, instead of securing a diligent conversion of the assets "into an available and distributable form." *Heathcote* v. *Hulme*, 1 Jac. & W. 122.

III. The only issue in this case is the amount due from the defendants Simmons and Spofford to the administrators. The transaction of August 25, 1883, by which the former paid $20,000 to the married daughters and the representative of one of them, and that of September 1, 1883, by which the widow and remaining children agreed that their shares should remain in the business at seven per cent interest, are not material to the issue, and the questions arising thereon cannot be determined by the decree in this case.

W. G. Russell & J. O. Teele, for the surviving partners and other defendants.

W. K. Blodgett, Jr., for the surviving married daughters.

MORTON, C. J. George W. Simmons died intestate, on December 14, 1882, leaving a widow and seven children. He was a member of the firm of George W. Simmons and Son, in which his son, George W. Simmons, Jr., and Philip A. Spofford were his partners. Immediately upon his death the two surviving partners formed a new firm under the name of G. W. Simmons & Co., and continued the business at the same place, using the capital and stock in trade of the old firm. Owing to a disagreement between the heirs, administration was not taken out until November, 1883, when the plaintiffs and the defendant Simmons were appointed administrators. In the mean time, the defendant Simmons had paid debts of his father to a large amount out of the property in the hands of the surviving partners; the widow and three of the children had, on September 1, 1883, made an agreement that their respective shares in the interest of the intestate "in the firm of G. W. Simmons and Son, Oak Hall, shall remain in the business as at present conducted by" the surviving partners, at interest at the rate of seven per cent per year, and on August 25, 1883, the defendant Simmons had paid to the other three children twenty thousand dollars, to be accounted for in settlement of the estate of the intestate on

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account of their respective shares in his interest in the firm of G. W. Simmons and Son. The surviving partners continued the business, using the capital of the intestate, with the consent and approval of the widow and the three children first above named; the other three children, being the married daughters, never gave any such consent, but objected thereto.

The suit was originally brought by two of the administrators against the surviving partners, but by amendment all the children of the intestate, and the representatives of the widow and of a deceased child, were made parties defendant. The only controversy is between the three married daughters and the surviving partners, the ultimate object of the suit being to recover the share to which they are respectively entitled of the profits of the business since the death of the intestate.

There is nothing in the case to show any want of fairness or good faith in the conduct of the surviving partners, but the master has found that the interest of the intestate was of such a character that the only way to realize its fair or substantial value was to deal with it as the defendants did, and "that the manner in which the defendants dealt with the full stock was necessary in order to obtain its full value." The master found that upon the death of the intestate the capital standing to his credit was $66,480.10, that to the credit of the surviving partners $14,787.38, making the whole capital $81,267.48. This is an outline of the principal facts in the case, and upon them the master reserved for the decision of the court the rule for the measure of the liability of the surviving partners.

If the accounts could have been settled at the death of the intestate, his representatives would have been entitled to receive the above named amount of capital standing to his credit. As we have seen, this was impracticable, and the surviving partners continued the business, using the capital of the intestate with the consent of those who represented five sevenths of his interest, and under the objections of the three dissenting heirs who represented two sevenths.

As a general rule, where a surviving partner continues to use the capital of a deceased partner in the business, the representatives of the latter, in the absence of any agreement to the contrary, have the election to demand either interest on the

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capital used or the profits earned by its use, the latter being accretions to the fund owned by them. There is, however, no inflexible rule governing all cases, but each case depends upon its own circumstances and equities.

The plaintiffs contend that in this case the rule should be that the profits accruing after the death of the intestate should be divided according to the amount of capital which each partner or person interested had in the business, and that no compensation or allowance should be made to the surviving partners for their services and skill in conducting the business. We do not think that this rule is supported by the authorities, or is just as applied to this case. It finds some support in *Crawshay* v. *Collins*, 15 Ves. 218; *S. C.* 1 Jac. & W. 267, and 2 Russ. 325. This case, which was before Lord Eldon at intervals for eighteen years, was a suit by an assignee of a bankrupt against the continuing partners of the firm of which he was a member; the assignee was held to be entitled to three eighths of the profits accruing after the bankruptcy, that being the proportion of the bankrupt's capital and profits in the business, but a just allowance was made for the services of the continuing partners. The case has been much commented on in later cases, and it has never been regarded as establishing an inflexible rule applicable to all cases. Indeed, in this case Lord Eldon says, "The rule which is to be applied must be deduced, in almost every case, from the particular circumstances of that very case"; and he fully recognized the justice of making allowance for the skill and services of the surviving partners. The later English authorities regard this as the effect of Lord Eldon's decisions in the various stages of *Crawshay* v. *Collins*. *Brown* v. *De Tastet*, Jacob, 284. *Cook* v. *Collingridge*, Jacob, 607. *Wedderburn* v. *Wedderburn*, 2 Keen, 722; *S. C.* 4 Myl. & Cr. 41, and 22 Beav. 84. *Willett* v. *Blanford*, 1 Hare, 253. *Yates* v. *Finn*, 13 Ch. D. 839.

In most of these cases the rule applied was, that the profits should be divided according to the capital, after making allowance for profits earned by the personal activity, attention to business, skill, and services of the surviving partners, though in *Wedderburn* v. *Wedderburn* the representatives of the deceased partner were held to be entitled to interest at the rate of five per cent on their capital, instead of a share of the profits.

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We think a just rule to be deduced from the authorities is, that, where there are no circumstances which render its application inequitable, the profits should be divided according to the capital, after deducting such share of them as is attributable to the skill and services of the surviving partner. When his good faith and fairness are not impeached, the most that the representatives of the deceased partner can justly demand is, that he should account to them for their capital, and, in addition, for whatever it has earned. This involves the necessity of inquiring how much of the profits is attributable to the services and skill of the surviving partners, and how much to the capital invested in the business. The latter portion of the profits shows what the capital has earned, and should rightfully be divided among the owners of the capital in proportion to their shares of the capital. It is clear, that, in applying this rule, any withdrawal or subtraction by the representatives of the deceased partner of any part of their capital would diminish *pro tanto* the proportion of the profits to which they are entitled. *Willett* v. *Blanford*, *ubi supra*.

In the case at bar, as we have said, there is nothing to impeach the good faith or fairness of the surviving partners. The defendant Simmons, who is the principal surviving partner, upon the death of his father, was placed in a very difficult and embarrassing position. A large amount of property belonging to his father was invested in the business. Owing to a quarrel among the heirs, no administrators were appointed for nearly a year. There was no one with any power to close up the business, either by a sale of the interest of the intestate, or otherwise; a majority of the heirs in number and amount desired him to continue the business. It is difficult to see how he could have done better than he did; he appears to have acted with due regard to the interests of all concerned, and no rule of a punitive character could justly be applied in the case. We think the rule of division of profits we have stated above will work out substantial justice to all parties, for that period of time when the surviving partners employed the whole or the principal part of the capital of the intestate as the basis of their business, that is, up to August 27, 1883.

In applying the rule, some questions arise as to the amount of

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the capital belonging to the plaintiffs which was from time to time embarked in the business and thus earning profits. Among the individual debts of the intestate was a subscription of five thousand dollars to the stock of a corporation recently established in Ballardvale, and a note of thirteen thousand dollars secured by a mortgage of real estate at Ballardvale. It was for some reason deemed necessary that these should be promptly paid, and the widow and all the heirs agreed in writing that the defendant Simmons should pay them out of any personal assets of the intestate. Accordingly, on May 4, 1883, he paid the subscription out of the assets of the new firm, and charged his father's account with the amount. The facts found by the master show that this was the only means he had of paying this debt. At one time he intended to apply to this debt the proceeds of the fifteen St. Paul and Sioux City bonds mentioned in the report; but the proceeds of these bonds were not in fact received in time to pay this debt. He could only carry out the wishes of all the interested parties by paying it, as he did, out of the property of the estate in the hands of the new firm. Such payment had the effect in law which it had in fact, of reducing the capital of the intestate in use in the new firm. We think that the same rule should apply to the other debts in good faith paid by the defendant Simmons and charged to his father's account; and that, after applying to such payments the amounts received by him for rents and used in making such payments, the balance should go in reduction of the capital of the intestate in use in the new firm.

After the death of the intestate the surviving partners were desirous of paying as soon as could be the amount of the capital which he left in the business. As we have seen, delay occurred in appointing administrators, and on August 27, 1883, the defendants paid to the three dissenting heirs the sum of twenty thousand dollars, which, in the words of the receipt signed by them, was "to be accounted for in settlement of the estate of George W. Simmons, deceased, as received on account of our respective shares in his interest in the firm of George W. Simmons and Son, and which to that extent shall be discharge of the liability of the surviving partners to us as heirs of said deceased, directly or through administrators." There can be no doubt

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that this was, in intention and effect, a withdrawal by the three dissenting heirs of twenty thousand dollars of their share of the capital. The only question is as to the mode in which this payment should be applied. It seems to us that the just mode is to ascertain what was the interest of the dissenting heirs at the time the payment was made, both in capital and accumulated profits which are attributable to capital, and from this amount to deduct the payment. The balance will represent the amount of their capital which continues in the firm, and for the use of which they are entitled to compensation. In ascertaining the amount of profits in this computation there should be deducted from the gross profits that share which is attributable to the services and skill of the surviving partners, which we understand the master finds to be forty per cent, and the balance should be divided according to the respective shares of the parties in the capital.

It also appears that, on September 1, 1883, the surviving partners made an arrangement with the widow and three of the children, by which they agreed that their respective shares in the interest of the deceased in the firm of G. W. Simmons and Son should remain in the business of the new firm at an interest of seven per cent per annum. The effect of this was to change the amount of their shares so far as they were concerned, from capital to a debt of the new firm, and to transfer the same amount of the capital to the credit of the surviving partners. The widow and three children who signed it, and the defendant Simmons, were entitled to five sevenths of the estate of the intestate, and the result of this arrangement therefore was that the surviving partners became the owners of the whole of the capital, except the small balance due to the dissenting heirs.

As we have before intimated, the principles we have discussed should be applied in ascertaining how much was due to the dissenting children on August 27, 1883. But, as we have seen, at that time a material change occurred in the circumstances and the relations of the parties which justifies and requires the application of a different rule for the future.

The surviving partners then, evidently as parts of the same scheme or purpose of relieving themselves of the responsibility of the care of the property of the intestate which was forced

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upon them, virtually paid to the widow and four of the heirs the amount of their shares of the estate of the intestate, and also paid to the three dissenting heirs twenty thousand dollars on account of their shares. This is more than the amount of their original shares, with interest; but upon applying the rule we have adopted, it is less than the amount they were entitled to at the time of the payment. 'The parties differed as to the basis upon which the accounts should be settled. The facts show that the surviving partners were willing to pay all that the heirs were entitled to; that they offered to have the books and accounts examined by any impartial expert, to be named by the dissenting heirs; that they offered to have the amount determined by arbitration, and that they were, when the administrators were appointed, active in urging and procuring the bringing of this suit, as the only means of fixing the amount of their liability.

It also appears that the business of the new firm was prosperous, and its profits very large; the surviving partners were anxious to pay what they justly owed the heirs, and it is not an unfair inference that the payment of this amount by the firm would not in any measure cripple its resources or injure its business. It is difficult to believe that the retention or withdrawal of this comparatively small amount would in any considerable degree affect the volume of business, or the amount of the profits. Under these circumstances, it would be inequitable to apply the rule of the division of the future profits according to the nominal capital. It would be unjust to the surviving partners, as it would compel them to work for the benefit of a compulsory partner against their wishes, and to bear the most of the burden of a protracted litigation, for which the dissenting heirs are at least equally to blame. It would give the latter more than they are fairly entitled to as the earnings or income of the debt which is due them, and swell unjustly the amount they receive from their father's estate.

We are therefore of opinion, that, unless the parties can agree, the case should be recommitted to the master to ascertain the balance due to the three dissenting heirs after the payment of August 27, 1883, upon the principles we have stated, and that thereafter the surviving partners should pay interest upon such

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balance at the rate of seven per cent per year. We adopt this rate of interest, because the defendants at the time of the payment in August fixed this as the worth to them of the capital retained.

A question remains as to the payment by the defendant Simmons of the Ballardvale mortgage above referred to. This payment was not made until after August, 1883, and cannot therefore be applied in reduction of the capital of the intestate before that day in determining the amount due to the dissenting heirs on that day. But it was made by virtue of an agreement with all the heirs. The dissenting heirs were responsible for two sevenths of it, and we think that, when paid, two sevenths of the amount should be charged to them in diminution of the amount then found to be due them.

The plaintiffs contend that this suit is to be treated as simply a suit between the administrators and the surviving partners, and that the latter should be decreed to pay to the former the whole amount of the accrued profits, without any regard to their payments to and agreements with the heirs, leaving the sum so paid to be distributed in the Probate Court. We do not think this is necessary or just. All the persons interested are parties to this suit. None have any controversy with the surviving partners, except the three dissenting heirs, and the object of the suit is to determine the amount to which they are entitled. This being determined, and paid, either directly or through the administrators, the object of the suit is accomplished, and the rights of all parties are protected. The amount, if paid to the administrators, would be for the sole benefit of these three heirs; no one else would have any claim upon it, and it is to be assumed that the Probate Court would order its distribution and payment to them. There would be no conflict between the two courts, and no mandatory order to the Probate Court. The decree would operate personally upon all the parties, and by its force would enable the dissenting children to receive the amount they are entitled to.

There is no necessity of going through the form of ordering the surviving partners to pay a large sum to the administrators which must be immediately repaid to them.

Case recommitted.

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CHARLES CIRIACK *vs.* MERCHANTS' WOOLEN COMPANY.

Suffolk. January 10, 11, 1888. — February 29, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Master and Servant — Personal Injuries — Negligence — Child.

A boy of twelve years of age and of average intelligence, who had worked for nearly two months in the same room with, but not upon, certain machines, the rapidly revolving gearing of which was upon the outside and in plain sight, while obeying an order from the overseer to "go up between" the machines to look for a tool, and to "hurry up," became entangled in the gearing and was injured. *Held*, that he could not maintain an action against his employer for the injury so received.

TORT for personal injuries sustained by the plaintiff on May 29, 1872, while in the defendant's employ. Writ dated June 16, 1885. Trial in the Superior Court before *Aldrich*, J., who allowed a bill of exceptions, in substance as follows:

The accident to the plaintiff occurred in the finishing-room of the defendant's mill, a room filled with gigs, shears, and other machines, all of which were run by steam or water power. The plaintiff was injured by one of the gigs, which were cylindrical machines for rubbing up the nap of the cloth manufactured in the mill. Two of these gigs stood together in the finishing-room, with broad passageways between them and the adjacent machinery but with a distance between the bodies of the two machines of about two and a half feet, the distance between them at the narrowest point, from the cogs of one gig to the belt wheel of the other, being about one and a half feet. The gigs had on one side a belt wheel, and on the other side gearing, in plain sight, consisting of three cog wheels, each about eighteen inches in diameter, and one small cog wheel about two and a half inches in diameter running through the middle of the cylinder of the gig. The cylinder of each gig stood in an iron frame fastened to the floor by four legs, the bottom of the cylinder at its lowest point being about one and a half feet from the floor. Nothing obstructed the view underneath the cylinder, except so far as the cylinder itself did so. The cylinder, as well as the gearing, moved always in the same direction.

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The plaintiff was caught in the place where the small cog wheel came in contact with the second cog wheel, being at a distance of about three and a half feet from the floor. The machine was run by a man or boy standing in front of it, by turning up or down a handle, which caused the cloth on the cylinder to go in one direction or the other, or to stop, as the case might be. The cylinder made about one hundred revolutions a minute, and the small cog wheel the same number. The machine, measuring its extreme projections, was about five feet square, and nearly six feet high. Men, women and boys were employed in the finishing-room. Some of the boys tended machines, and there were four others, among whom were the plaintiff and his older brother, whose duty it was to take cloth from an apron on the back of the finishing shears, and wheel it on trucks through the passageways to the gig-room; also, to take cloth from racks, and wheel it to the finishing shears, and sew it on to the apron. These racks were small slat platforms, about four inches from the floor, and directly in front of and within six inches of the two gigs, though they had no connection with them. These racks sometimes had cloth piled upon them to the height of three or four feet, but there was no evidence that there was any cloth upon them at the time of the accident. In a line with these racks, and at a distance of about seven and a half feet apart, were posts, which supported the floor above, and were in a line half-way between the two sides of the room, and the racks lay between or just outside of these posts. The regular way to the gig-room was through the passageways, but some of the men and boys in going to and from the gig-room sometimes went between the gigs, as a shorter cut from one room to the other. There was room enough for a man to pass, with care, between the gigs when they were running, but the space was not designed or intended for a passageway for general passing, the broader passageways being provided for that purpose. There was conflicting evidence as to how light the place was at which the plaintiff was hurt.

Charles Ciriack, the plaintiff, testified that he was born on February 23, 1860, and that the accident happened on May 29, 1872, at about ten o'clock in the forenoon. He had lived in Dedham, near the defendant's mill, most of his life, and, having

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stopped going to school in 1871, went to work for the defendant for a month in the spring of that year in the flock-room, a room off of the finishing-room. He worked there on a flock machine, which he described as having no gearing on it, and his duty was to shovel the flocks into the machine. Before he went into the flock-room he knew nothing about machinery. In passing into the flock-room he did not have to go near the gigs, by one of which he was subsequently hurt, and did not know anything about them at that time. After working in this room he returned to school, and came back into the defendant's employ in April, 1872, and worked for it nearly the whole of April and May, down to the time of the accident. He was employed by the superintendent, who told him that he was to do what Craven, the overseer of the finishing-room, told him to do. Craven took him into the finishing-room, where his brother and other boys were working, and told him that they would show him what to do, and left him there. These boys showed him how to fold cloth from the gig-room off on to racks. When a piece was wanted on one of the shears, "we would fetch it off of this rack and hitch it on to the apron on the back of the shears. We had to take the cloth off of the shears when it was sheared, pull it off, fold it to same place we put it on, pull it off on to our trucks, and wheel it through a long entry into the gig-room, and one of the gig-room hands would help us fold it on to racks that they had in the gig-room; then we would fetch back the empty truck, deposit at these racks, and put a piece on it ready to put in the shears again. We took turns wheeling: one would go at one, and another at another time. The boys told me nothing else. We had nothing to do with the gearing on the shears. The fellows who run the shears stood behind them. The gearing runs along the side. My attention was never called to the gearing on the gig that I got hurt on. I never got any instructions at all outside of what the boys minded to give me. The overseer under Craven told me one day, when he saw me walk by a piece of lace leather on the floor, to pick it up and carry it down and put it on the bench where he used to have his tools, and never to let him see me again walk by anything that was on the floor without picking it up."

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"On the day of the accident, I was coming up from the gig-room, after wheeling in a piece of cloth, and when I got up near the corner of the aisle intersecting the passageway from the gig-room, Miller, who was our 'boss,' spoke to me from the tool bench, and told me to go up between the gigs and look for his belt punch and hurry up. I brought my truck up in front of one of the racks and left it, and went round into the space between the two gigs. As I was going, my brother wanted me to put a piece on one of the shears. I told him that I would be with him in a minute. I went in between the gigs and stooped down to look underneath the gig. As I was rising up, I saw a piece of lace leather which had been left there, such as you sew a belt with; I picked that up. I could not see the belt punch. As I rose up, the gears caught my jacket sleeve above the elbow and drew in my arm. When I felt it catch the sleeve, I grabbed my arm by the wrist, but it went so fast I could n't get it out before it was mangled."

He further testified, that he had never received any instructions from anybody about machinery or its dangers, either before or after he went into the defendant's employ, or during it, except as already shown, and that his knowledge of the parts and character of the machinery, except the flocking machine in the defendant's mill, was wholly derived from inspection of the same after the accident; that his duties in the gig-room required no connection with the machines therein, and did not require him to look at them; that he knew the machine that he was hurt on was called a gig, but he had never troubled himself to learn its uses, or its dangers, or the manner in which it was operated; that the duties of his job required him to devote his whole time to it; that his job did not require him to go near the gearing on which he was caught, nor into the space between the gigs, nor to look in the direction thereof; that when he was near the gig, he was behind the revolving cylinder; that he never, in his recollection, passed into the space between the gigs, except at the time when he got caught; that the overseer directed him to hurry, and he obeyed orders; that he did not recollect of ever passing in and out among the machines, except this one time, unless going through the broad passageways was passing in and out among the machines.

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On cross-examination, he testified that when he was at work in the flock-room, and passed through the finishing-room, he had no doubt that he saw the gig there, but did not recollect about it; that the flock machines were operated by steam power; that he understood at that time that if he knew of danger anywhere he would look out not to get into it, and that he appreciated the fact that it was necessary to take care as far as he knew; that he supposed that he felt like getting out of danger if there was any; that the gig-room into which he wheeled cloth contained a large number of gigs in operation having gearings; that he probably saw these gigs in operation, but paid no attention to them, because he had nothing to do with them; that when he fastened the cloth upon the apron on the finishing shears, the machine was stopped; that there was cloth upon the racks in front of the gigs at the time of the accident, but he did not remember how much, or whether the pile was six inches or three feet high; that the machine at which he was hurt was in operation at the time he was injured; that he could not say whether he did or did not know that it was in operation before he went in there; that he could not say that when he stooped down he did not see that the machine was in operation; that he would not say that he did not see it in operation, but could not recollect; that he had no doubt that the cylinder was going round, but did not believe that he took any notice of it; that he walked into the space between the two gigs close up to the machine, and that he did not believe that he looked at the machine or took any notice whether it was in operation; that he was in a hurry after the belt punch, which he was directed by the "boss" to get, and that he believed that that was the only thing that he had on his mind when he went in there; that there was some cloth dust or "flocks" on the floor under the gig, but how much he could not say; that at the time of the accident he was about the average height of boys of twelve years of age; that he could look under the machine without difficulty, but that it was necessary to stoop; that he did stoop down on the floor as far as he could get with his hands to the floor; that when he stooped he was probably within about a foot of the gears; that he might have been nearer; that he did not recollect whether he took notice before he stooped whether they

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were running or not; that when he got down on his hands on to the floor, he did not see the belt punch; that he could not say that during the week that he had worked in the finishing-room he had learned to look out for machines in operation, though no doubt he intended to keep out of such danger as he then appreciated; that he now supposed that he then thought that there was danger around the belts and such places, but that he did not believe that he then knew enough about them to know whether the danger was in them; that he had no doubt that he had seen the gearing; that he did not know as he had ever thought anything about the effect of his exposing his person or his clothing to contact with it, but that he knew enough at that time not to put his hand or his clothing into wheels in operation; that if he had seen the wheels revolving at the time, he believed that he would not have intentionally let his hand, or his arm, or his sleeve get in; that if he had noticed that the wheels were revolving, he did not know whether he would have known enough when he rose not to come into contact with them, and thought that he did not know that there was any danger in them at the time; that he did not believe that when he went in there he knew that there was gearing on the gig; and that he did not get hurt in consequence of putting his hand into the cylinder to play with a piece of string, and by his arm being suddenly thrown back against the gearing.

Miller, the "boss" referred to, died before the action was brought. Other witnesses for the plaintiff testified that the plaintiff possessed the average intelligence, and was as careful as the other boys.

Michael Craven testified, for the defendant, that he was overseer of the finishing-room until a day or two before the accident; that the plaintiff was a smart, bright boy; that he had seen the plaintiff as well as the other boys passing in and out among the machines; that there were no restrictions put on the boys about going in through them; and that there was plenty of room to get through. Frederick Bradley testified, that he was employed by the defendant at the time of the accident; that he asked in plaintiff's presence how the accident occurred, and some one said that the plaintiff was fooling with the machine, and the plaintiff said nothing. Mary Sullivan testified that she worked for the

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defendant in May, 1872, and "saw the plaintiff put his hand out towards the machine, as if he were picking something from some part of the machine. I happened to look up from my work and saw this, and then looked down and did n't see him again." William J. Kennedy testified that he "was in defendant's employ. At the time of the accident, I was in the finishing-room. Saw plaintiff in front of the gig. He was pulling something off the cylinder. It did n't suit him. He got round on the side, and undertook to catch it there. In catching it, he ran his arm up that way, followed it up the cylinder round this way, towards him, and the gears run this way too, and he followed it, and his arm went in."

The defendant asked the judge to rule that there was no evidence which would warrant a verdict for the plaintiff, which ruling the judge declined to give. The jury returned a verdict for the plaintiff for $8,000; and the defendant alleged exceptions.

R. M. Morse, Jr., & H. G. Nichols, for the defendant.

H. W. Bragg & E. Greenhood, for the plaintiff.

1. An employer must see that servants are properly warned of the dangers of the place in which they are put to work, and is not relieved of responsibility for the consequences of a failure on their part to receive such warning by any delegation of the duty to warn to any agent or overseer, or by a neglect on the latter's part to give such warning. *Gilman* v. *Eastern Railroad*, 13 Allen, 433, 441. *Coombs* v. *New Bedford Cordage Co.* 102 Mass. 572, 599. *Wheeler* v. *Wason Manufacturing Co.* 135 Mass. 294. *Grizzle* v. *Frost*, 3 F. & F. 622. The sufficiency of the plaintiff's experience, as well as of his age and judgment, to relieve the defendant of the duty of giving him notice, was a question for the jury.

2. This court has sustained a verdict as to due care in a case disclosing evidence of a far less favorable character. *Coombs* v. *New Bedford Cordage Co.*, *ubi supra*. The undisputed evidence reported must conclusively show contributory negligence on the part of the plaintiff, considering all the admitted or undisputed facts in the case, including the age, experience, and intelligence of the plaintiff and the danger to which he was exposed, and the means of knowledge afforded to him, to justify the court in taking the case from the jury on the question of due

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care. *Lane* v. *Atlantic Works*, 107 Mass. 104, 108. *Tyler* v. *New York & New England Railroad*, 137 Mass. 238, 242.

When the circumstances under which the plaintiff acts are complicated, and the general knowledge and experience of men do not at once condemn his conduct as careless, it is plainly to be submitted to the jury. What is ordinary care in such cases, even though the facts are undisputed, is peculiarly a question of fact to be determined by the jury under proper instructions. The refusal of the judge to withdraw the case from the jury cannot in any case be construed as an indication that in his opinion the jury ought to find in the plaintiff's favor upon this question. *Gahagan* v. *Boston & Lowell Railroad*, 1 Allen, 187. *Warren* v. *Fitchburg Railroad*, 8 Allen, 227. *Meesel* v. *Lynn & Boston Railroad*, 8 Allen, 234. *Reed* v. *Deerfield*, 8 Allen, 522. *Fox* v. *Sackett*, 10 Allen, 535. *Gaynor* v. *Old Colony & Newport Railway*, 100 Mass. 208, 212.

In a case of a boy thirteen years of age who incited a dog to bite him, the court held that the test is, "Would the injury have been prevented if the boy had exercised the thoughtfulness of one of his age, at the moment, without stopping to reflect?" *Plumley* v. *Birge*, 124 Mass. 57.

The evidence showed that the plaintiff exercised the care which might be expected of a boy of his age and experience under the circumstances disclosed by the evidence.

See also Wood, Master and Servant, 880, 886; *Cayzer* v. *Taylor*, 10 Gray, 274, 281, 282; *Munn* v. *Reed*, 4 Allen, 431; *Snow* v. *Housatonic Railroad*, 8 Allen, 441; *Carter* v. *Towne*, 98 Mass. 567; *Lane* v. *Atlantic Works*, 107 Mass. 104; *Ford* v. *Fitchburg Railroad*, 110 Mass. 240, 259; *Murley* v. *Roche*, 130 Mass. 330; *Johnson* v. *Boston Tow-Boat Co.* 135 Mass. 209, 211; *O'Connor* v. *Boston & Lowell Railroad*, 135 Mass. 352; *Railroad Co.* v. *Fort*, 17 Wall. 553; *Siegel* v. *Schantz*, 2 Th. & C. 353; *Mann* v. *Oriental Print Works*, 11 R. I. 152; *Lalor* v. *Chicago, Burlington, & Quincy Railroad*, 52 Ill. 401; *Grizzle* v. *Frost*, 3 F. & F. 622; *Somerville* v. *Gray*, 1 Ct. of Sess. Cas. (3d series) 768; *Morton* v. *Edinburgh & Glasgow Railroad*, 2 Ct. of Sess. Cas. (3d series) 589; *Murphy* v. *Smith*, 19 C. B. (N. S.) 361.

C. ALLEN, J. In order to show negligence on the part of the defendant, the plaintiff relies on the omission to give him suitable

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instructions in reference to the dangers to which he would be exposed in the course of his employment. His injury arose from coming in contact with the revolving cog wheels of a machine; and the instructions which he was entitled to receive must therefore have been concerning the danger from that cause. But it seems to us that it must fairly be assumed that the plaintiff had all such knowledge as it was the duty of the defendant to impart to him. There was no peculiar or secret source of danger. Anybody seeing the machine in motion must soon become aware of the danger which would arise from coming in contact with it. The duty of the defendant would be sufficiently discharged by pointing out to the plaintiff the situation of the machine, and the rapid revolution of the wheels when in operation, and explaining the probable effect of touching them under these circumstances. Certainly the duty of the defendant did not extend so far as to require the giving of a special caution on every occasion when he might be called upon to pass near the machine. The master is only bound to give such instructions as are reasonably necessary in order to enable the servant to understand the perils to which he is exposed by reason of his employment. A servant is held to take the risk of such dangers as are known and understood.

In the present case, the duty of the defendant to the plaintiff would not require an explanation of anything which he already sufficiently understood. In order to show actionable negligence on the defendant's part, it was incumbent on the plaintiff to show an omission to inform him of something which he needed to know in order to be safe. *Sullivan* v. *India Manufacturing Co.* 113 Mass. 396. In the absence of anything to show the contrary, the plaintiff must be assumed to have had the intelligence and understanding which are usual with boys of his age. There is nothing to show that he did not know the danger of coming in contact with the revolving wheels of the machine. It must be assumed that he was well aware of it. The accident happened in consequence of his omitting to guard against a known peril. He had been employed in the same room for a period of nearly two months. There is no reason to suppose that explicit instructions, if given to him at the beginning of his employment, in reference to the danger of touching these wheels when in motion, would

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have added anything to what he must fairly be presumed to have known at the time of the accident.

It would be carrying the doctrine of holding employers to the duty of giving reasonable instructions to their servants quite too far, to require a special caution every time a boy is sent on an errand, under circumstances like those disclosed in the present case. The injury appears to have arisen from a lack of sufficient precaution on his part, and not from the negligence of the defendant. *Russell* v. *Tillotson*, 140 Mass. 201. *Williams* v. *Churchill*, 137 Mass. 248. *Wheeler* v. *Wason Manufacturing Co.* 135 Mass. 294.

In *Coombs* v. *New Bedford Cordage Co.* 102 Mass. 572, 598, which is chiefly relied on by the plaintiff, the plaintiff had been at work for the defendant only one day, and under these circumstances the evidence of the nature of the work, and of the position in which he was to do it, were considered to warrant the jury in finding that the plaintiff was manifestly incapable of understanding and appreciating the dangers to which he was exposed by the gearings, or manifestly incapable of performing the work there with safety.

In the present case, we are of the opinion that there was no sufficient evidence of negligence on the part of the defendant.

Exceptions sustained.

JOHN J. ROSENBERG *vs.* JOHN DOE.

Suffolk. January 12, 1888. — February 29, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Release — Seal — Seamen's Wages — Fraud or Coercion — Statute.

The mutual release of wages by master and seamen before a shipping commissioner, provided for by the U. S. Rev. Sts. § 4552, need not be made or authenticated under seal, and is conclusive if it is executed and attested as required, without fraud or coercion.

HOLMES, J. This is an action by a seaman against the master of a vessel to recover a balance of wages alleged to be due.

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The defendant denies the liability, and also sets up a release executed before a shipping commissioner under the U. S. Rev. Sts. § 4552. The plaintiff is a Finnish sailor, and speaks the English language very imperfectly. At the trial he testified that he did not know the contents of the release when he signed it, and did so thinking it was a mere receipt for the money actually received. He also testified to circumstances which he relied on as showing fraud on the part of the commissioner, but which it is unnecessary to state, as the instructions* to the jury required them to find that the release was signed, not only without any fraud, deception, or coercion, but also with knowledge of its contents, in order to constitute a bar. This we think was too broad, and started an inquiry which the statute cannot have intended to leave open.

The statute enacts that upon the completion, before a shipping commissioner, of any discharge and settlement, the master and seamen shall sign "a mutual release of all claims for wages in respect of the past voyage or engagement," in his presence, and that he shall also sign and attest it, &c., provided both the master and seamen assent to such settlement, or the settlement has been adjusted by the shipping commissioner. "Such release, so signed and attested, shall operate as a mutual discharge and settlement of all demands for wages between the parties thereto, on account of wages, in respect of the past voyage or engagement."

The release in this case did not bear the seal either of the parties or of the shipping commissioner. But from the nature of the transaction, and from the word used ("sign"), we assume, as it was assumed by the court below, that the release need not be a technical release under seal in order to have the effect given

* The judge instructed the jury, that if the plaintiff signed the release before the shipping commissioner without any fraud, deception, or coercion, and with knowledge of its contents, it constituted a full discharge of the claim; that they must determine upon all the circumstances, as, for instance, his imperfect knowledge of the language, the fact that some of his shipmates were present and signed the same release at the same time, that he had never served upon an American vessel before, and other facts before them, whether the plaintiff understood what he was doing when he signed the release, and did it intelligently; that if he signed it knowing what it was, he could not recover; but if he signed it, not understanding its purport or legal effect, it did not constitute a bar to the plaintiff's claim.

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it by statute. We are also of opinion, that if the execution before the commissioner, and his signature and attestation, are established, the absence of his seal to authenticate his act (§ 4506) does not deprive the release of its effect. The instrument followed the words of the statute, and therefore, by the terms of the act, it had at least the effect of a release under seal irrespective of any question of consideration.

Coming now to the ruling, it authorized the jury to find for the plaintiff if they found that he did not know the contents of the release, although they should be of opinion that there was no direct or indirect misrepresentation to him of its contents, or other fraud, or any declaration by him of what he understood its contents to be, or any request by him to have it read in a language which he understood (if he could not read English), or any pressure brought to bear upon him to make him sign without having it read. This would not be the law in the case of a release under seal. *Leddy* v. *Barney*, 139 Mass. 394, 396. *Upton* v. *Tribilcock*, 91 U. S. 45, 50. Shep. Touchst. 56. Com. Dig. Fait (B 2). We think that it is not the true construction of the statute. We are of opinion that the statute means to make the release conclusive, if it is executed and attested as required, without fraud or coercion. See *Lamb* v. *Briard*, Abb. Adm. 367.

Reading the act in the way most favorable to the plaintiff, the proviso that "both the master and seamen assent to such settlement" is only attached to the requirement that the parties shall sign. If they do sign, the effect of their signatures must be determined by the ordinary rules of law. Signature under such circumstances as we have supposed conclusively imports assent to the instrument, and the instrument expresses consent to the settlement. It is contrary to first principles to allow a person whose overt acts have expressed assent to deny their effect on the ground of an undisclosed state of his mind for which no one else was responsible. *O'Donnell* v. *Clinton*, 145 Mass. 461. The common law makes no exception to these principles in favor of seamen, nor do we see any evidence that the statute meant to make one. *Exceptions sustained.*

F. Cunningham, for the defendant.

J. M. Browne, for the plaintiff.

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STEPHEN BROCK *vs.* OLD COLONY RAILROAD COMPANY.

Norfolk. January 16, 1888. — February 29, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Railroad — Location — Taking — Notice — Plan.

The filing of a railroad location, identifying the land taken, under the Rev. Sts. c. 39, § 75, was a sufficient notice of the taking.

A plan filed with a valid railroad location did not bear the name of the owner of certain land taken, but did give that of an adjoining owner. *Held*, that the former could not have been misled by such omission.

A railroad filed a valid location in 1854, under the Rev. Sts. c. 39, § 75, but did not furnish a plan to an owner of land taken but not actually used until 1879. *Held*, on a writ of entry brought by such owner in 1886, that his right to a plan if it existed, was a naked right, and would not entitle him to recover.

WRIT OF ENTRY, dated October 1, 1886, to recover a parcel of land in Stoughton. The case was submitted to the Superior Court, and, after a judgment for the tenant, to this court, on appeal, on an agreed statement of facts, in substance as follows:

On September 27, 1854, the plaintiff owned a tract of land in Stoughton, which was bounded on its easterly side by land of O. Ames and Sons. The Easton Branch Railroad Company, to whose rights and liabilities the tenant had succeeded, was incorporated by the St. of 1854, c. 55, and on September 27, 1854, filed the location of its railroad in the office of the county commissioners of the county of Norfolk. A plan accompanied, and was made a part of the location. By such location and plan the demandant's name did not appear as one of the persons whose land was taken in and by the location, though the name of O. Ames and Sons did so appear; but by an application of the monuments, boundaries, courses, and distances given in the plan and location to the land itself, it appeared that the demanded premises were included in the location.

The Easton Branch Railroad Company afterwards constructed its road over the land described in its location, but did not before doing so furnish the demandant with a plan of his land included in its said location, nor did the plaintiff request such a plan.

The Easton Branch Railroad Company or the tenant did not fence or enter into actual occupation of the demanded premises

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until the year 1879, since which time the tenant has been in actual occupation against the objection of the demandant, who up to that time had no actual knowledge that any of his land was included in the location, nor any notice of that fact except such as was given by the filing of the location. The demandant has never parted with his title to the demanded premises except as herein stated, nor did the Easton Branch Railroad Company or the tenant ever pay the plaintiff any damages or compensation for the taking of his land.

O. A. Marden, for the demandant.

J. H. Benton, Jr., for the tenant.

HOLMES, J. The location identified the land, and therefore satisfied the Rev. Sts. c. 39, § 75. Filing it was sufficient notice of the taking. *Woodbury* v. *Marblehead Water Co.* 145 Mass. 509. *Grand Junction Railroad* v. *County Commissioners*, 14 Gray, 553, 564. As pointed out by the tenant, it must be presumed that the demandant was notified of the petition for authority to take, as required by the Rev. Sts. c. 39, §§ 46–48. The authority and its limits are contained in the charter, St. 1854, c. 55, and acts referred to. It would be impracticable to make the validity of the taking depend upon notifying all owners personally by name, and in proceedings *in rem* of this sort it is not necessary. In view of the above decisions, we do not think it requisite to do more than cite a few cases from other States, which sustain or go beyond our opinion. *Johnson* v. *Joliet & Chicago Railroad*, 23 Ill. 202. *Cupp* v. *Commissioners of Seneca County*, 19 Ohio St. 173. *Stewart* v. *Board of Police*, 25 Miss. 479. *Wilson* v. *Hathaway*, 42 Iowa, 173, 176. *Owners of Ground* v. *Albany*, 15 Wend. 374. *George's Creek Coal Co.* v. *New Central Coal Co.* 40 Md. 425, 438.

It should be added, that the agreed facts do not warrant the assumption of the demandant in his argument that the names of other owners did appear in the location and plan in such a way as naturally to mislead him into the assumption that no part of his land was included.

The objection that the demandant was not furnished a plan is pretty nearly disposed of by *Abbott* v. *New York & New England Railroad*, 145 Mass. 450. The fact that the land in controversy belonged to a different person from the owner of the adjoining

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land actually used by the railroad, whether or not it might be important under other circumstances, is not so in this case. The failure to furnish a plan did not affect the tenant's title, (145 Mass. 451,) nor suspend the running of the time for applying for damages, which has long gone by. Rev. Sts. c. 39, § 58. *Charlestown Branch Railroad* v. *County Commissioners*, 7 Met. 78. *Hazen* v. *Boston & Maine Railroad*, 2 Gray, 574, 580. *Meriam* v. *Brown*, 128 Mass. 391, 393. The right of the demandant now to require a plan, if it exists, is a naked right of no practical use, and does not entitle him to recover in this action. *Judgment affirmed.*

CATHARINE MURPHY, administratrix, *vs.* LEANDER GREELEY.

Suffolk. January 17, 1888. — February 29, 1888.

Present: MORTON, C. J., DEVENS, HOLMES, & KNOWLTON, JJ.

Negligence — Personal Injuries — Evidence — Due Care.

A contractor to do the carpenter-work on a brick building in process of erection, who hires an experienced carpenter in the full possession of his faculties to do the furring on a room, is not bound to maintain artificial lights to prevent his wandering out of a regular passageway, and will not be liable to him if he so wanders in the darkness, and, falling through an opening in another room, is injured.

Evidence of the usage of builders as to guarding the openings in the floors of buildings in process of construction is competent on the question whether an experienced carpenter, who is injured by falling through such an opening, was in the exercise of due care.

TORT for personal injuries occasioned to the plaintiff's intestate, by falling through an opening in the first floor of a building in process of erection, while in the defendant's employ.

At the trial in the Superior Court, before *Mason*, J., it appeared that the defendant had made a contract to perform all the carpenter-work required in the construction of a family hotel. At the time of making this contract, the defendant saw the plans of the building, including the plan of the first floor, and for a long time prior to the accident had been upon the premises five or six times every week, and was familiar with the

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different parts of the building. The defendant began his work under his contract, and prior to the time of the accident had laid the flooring on the first floor, and had completed some other parts of the carpenter-work in the building. In laying this floor the defendant had, following the plan, left, in the floor of a room marked "store-room," an opening which was intended for a stairway to the cellar, in which at the time of the accident no staircase had been built.

On January 6, 1885, the plaintiff's intestate, James Sinnott, was employed by the defendant's foreman, who was authorized to employ help, to fur a certain room in the building other than the store-room. Sinnott was fifty-five years of age, a carpenter by trade, with full possession of all his faculties, and had worked on carpenter-work in the construction of buildings for more than twenty years. Sinnott was to work for so much per square, and nothing was said to him as to the hours when he was to work. No contract had been made with him for furring any other rooms, and under his contract he had no employment or business taking him into the store-room. The only way of going, as Sinnott testified, from the street entrance of the building to the room where he was employed, or of returning from that room to the street, was by a passageway which, at about the centre of the building, led through an opening adjoining a passageway leading into the store-room. In the neighborhood of both these passageways it was at times very dark, and was so at the time of the accident, so that a person who had just come in from the light could not see his hand before his face. One witness testified that on the night of the accident, when he was retiring from his work (about ten minutes after Sinnott quit work), he got lost in this same locality, came near getting into the store-room passageway, and only found his way by lighting a match. All these facts in relation to the position of these passageways, their darkness, and the existence of this opening in the store-room, were known to the defendant, and to his foreman.

On January 7, 1885, Sinnott came to the building as agreed, and, passing from the entrance along the passageway to the room which he had contracted to fur, commenced his work there, and remained in that room during the day. At night he did not retire from the building by the passageway, but

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passed out through a window opening on to the street from the room where he was at work. The next day in like manner he returned through the passageway to his work; remained in the room all day as before, stopped work at about five o'clock on account of the darkness, and, being unable to go out of the window as on the evening previous on account of its having been closed and fastened, started for the street entrance of the building by the passageway. When he arrived opposite the passageway leading into the store-room, he became confused on account of the darkness, not having before passed out of the building in this way, and supposing that the passageway leading into the store-room was the passageway which he ought to take, wandered, feeling with his hands and feet, into the store-room, and fell into the opening.

Sinnott did not know of the existence of this opening, and no express notice was given to him of its existence, either by the defendant or Higgins, and no notice at all except such, if any, as can be implied from the facts stated. There was no guard or railing around the opening, or at the entrance to the passageway leading to the store-room, and no light was put up at any point, either to mark the proper passageway out of the building or to mark the locality of the opening. All the brick partitions, as also all the brick-work of the entire building, which was five stories in height, were completed, and the openings in the walls for light were filled with sashes of cotton cloth, but the wooden partitions on the first floor were not at the time of the accident erected.

The plaintiff called one Harmon, who testified, on cross-examination, that he was a builder and contractor, and supervisor of the erection of buildings, and had been for many years; that it was not usual in erecting buildings to protect, or guard, or light up holes and openings in the floors, while in the process of construction, nor to light up the passageways in such buildings by artificial light. This was objected to by the plaintiff, but was admitted by the judge. The defendant called certain builders and contractors, who testified that it was not the custom in erecting buildings to protect, or guard, or light holes and openings in the floors of buildings while in the process of construction, and that the usage was to leave them open and

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unguarded. The defendant, in offering this testimony, did not state for what purpose it was offered; but the judge admitted it generally, under objection.

The judge ruled that the action could not be maintained, and directed a verdict for the defendant; and the plaintiff alleged exceptions.

W. Gaston & C. L. B. Whitney, for the plaintiff.

Samuel Hoar, for the defendant.

KNOWLTON, J. To determine whether the defendant neglected his duty towards the plaintiff's intestate, we must first inquire what were the relations out of which his duty grew. He had a contract with the owner to do all the carpenter-work upon a large brick building five stories high, then in process of erection. Its outer walls and inside brick partitions were all completed, and the openings for windows were filled with sashes of cotton cloth. The flooring on the first floor had been laid, but the wooden partitions there had not been erected, and the carpenter-work in general was not far advanced. The plaintiff's intestate, James Sinnott, made a contract with him to do the furring of a room upon the first floor, at a certain price per square yard. The only duty which he owed Sinnott grew out of this contract. The passageway to the place where the work was to be done extended from the main entrance through the building a considerable distance to the room to be furred, and there was evidence that near the centre of the building the locality about the passageway was at times very dark; that at the time of the accident it was so dark that one could not see his hand before his face; and that Sinnott, having stopped work at about five o'clock on account of the darkness, it being winter, attempted to go out through this passageway, mistook his course, went through an opening in the wall which led to a room in the floor of which was an open space for a stairway to the basement, fell through this open space, and was injured. He testified that there was no other way than through this passageway to get to the room where the work was to be done, and it is to be presumed that he passed through it when he was shown the room at the time he took his contract. He entered by it in the morning on each of the two days that he worked. He was fifty-five years of age, a carpenter by trade, in full possession

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of all his faculties, and he had worked in the construction of buildings for more than twenty years.

In connection with such a contract, made under such circumstances, the law implied no contract on the part of the defendant, and imposed no duty upon him to have the building in such a condition that persons could wander through it in the darkness away from the regular passageway without risk of falling. Nor was it his duty to maintain artificial lights for those who should choose to attempt to go through after nightfall.

The burden was upon the plaintiff to show that the accident happened through the negligence of the defendant. The defendant was under no obligation to provide against the ordinary risks incident to the performance of the contract which the plaintiff's intestate entered into, nor against any special risks incident to the peculiar manner in which he might perform it. If it can fairly be said, contemplating the probabilities from the situation of the parties when they made their contract, that there was any risk that Sinnott would remain at his work until it was so dark in the passageway that he could not see his hand before his face, and then attempt to go through there without a light, and meet with an accident, that must be deemed to have been an ordinary risk of the business which he contracted to do, or a risk growing out of the peculiar manner in which he chose to do it. We do not think there was any evidence of negligence on the part of the defendant.

The testimony introduced in relation to the custom and usage of builders in reference to openings in the floors of buildings while in the process of construction, taken in connection with the testimony of the plaintiff's intestate as to his experience as a carpenter, tended to show what he had reason to expect, and what dangers he was called upon to guard against, and so was competent upon the question whether he was in the exercise of due care. Whether or not it was admissible for any other purpose, in the form in which it was presented, it is unnecessary to decide. *Exceptions overruled.*

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SARAH L. BROOKS & others *vs.* CHARLES F. ALLEN & another.

Suffolk. January 25, 1888. — February 29, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Lease — Rescission — Fraud — Use and Occupation — Insolvency.

A lease was given with a forged guaranty, and subsequently a firm formed by the lessee and another person occupied the premises, the lessor relying for the rent on the lessee alone and the supposed guarantor. On the discovery of the fraud, the lessor gave the lessee notice to quit within fourteen days for nonpayment of rent, and before the end of that period the firm went into insolvency. *Held*, that there was no rescission of the lease till after the firm was in insolvency, and that the firm was not liable for use and occupation.

APPEAL from a decision of the Court of Insolvency, disallowing the claim of the appellants against an insolvent estate. The appeal was heard in the Superior Court, and, after a judgment dismissing the appeal, in this court, on appeal on an agreed statement of facts, in substance as follows:

The appellants, owners of a store in Boston, made a new lease thereof, on January 21, 1885, to the appellee Allen, who was occupying the premises under a guaranteed lease. Allen agreed to obtain a guaranty of the new lease from the same guarantor, and the lease in the form of an indenture in two parts was delivered to him. Allen subsequently redelivered one part, duly executed by himself, which bore a contract of guaranty at the end of it with what purported to be a signature of the guarantor affixed thereto.

On February 1, 1885, Allen took into partnership the appellee Dennan, and thenceforward the premises were occupied by them under the firm name and style of Allen, Dennan, & Co., which fact was known to the appellants. The bills for rent were made to Allen, and the appellants took no steps to recognize the firm as their tenants. On December 7, 1885, the rent being in arrears, the appellants served on Allen a notice to quit for nonpayment of rent, within fourteen days from date; and on that day the appellants were notified by a son of the guarantor that what purported to be his signature upon the lease was a forgery. The fact of the forgery was admitted, and Allen was

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indicted therefor. The appellants, on January 1, 1886, rented the premises anew.

On December 17, 1885, Dennan petitioned himself and the firm into insolvency; and the appellants claimed to prove against the firm for the arrears of rent, all of which accrued while the premises were occupied by the firm; but their claim was disallowed against the firm, and only allowed against the separate estate of Allen, who has never gone into insolvency.

F. Cunningham, for the appellants.

J. P. Prince & E. G. Alexander, (*W. F. Slocum* with them,) for the appellees.

C. ALLEN, J. According to the understanding of all parties, the rent was to be paid by Allen alone, and not by the firm. There could have been no pretence for holding the firm but for the fraud in respect to the guaranty of the rent. This fraud was practised by Allen alone, before the time when Dennan became his partner. There is nothing to show that Dennan had any more reason to suspect this fraud than the lessors had. The lessors relied only on Allen, and on his supposed guarantor, for the rent. Upon discovery of the fraud, they were entitled to treat the lease as invalid; or, at their option, they might treat it as valid. The lease was voidable, — valid till avoided.

The notice to quit for nonpayment of rent was no rescission of the lease; and if it were, it did not take effect till after fourteen days. There was no rescission of the lease till after the firm was in insolvency. Now, however it might be with regard to Allen alone, a rescission of the lease cannot relate back so as to make the firm liable for the use and occupation of the store prior to the time of such rescission. There was no express contract binding the firm; and there was no implied contract arising from the use and occupation, because the use and occupation were under an express contract with Allen. If the lessors were deceived and misled by Allen, that does not show an implied promise on the part of Dennan, or of the firm, until the happening of something further. Prior to the rescission the firm was not liable, because their use and occupation were by virtue of the lease to Allen, which was still in force. After the rescission the firm was not liable, because it no longer occupied the store, and the rescission did not have the effect to make it

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liable for past use and occupation, enjoyed under a special contract or lease, by which Allen promised to pay the rent. *Leonard* v. *Kingman*, 136 Mass. 123. *Earle* v. *Coburn*, 130 Mass. 596. *Massachusetts General Hospital* v. *Fairbanks*, 129 Mass. 78, 81. *Central Mills* v. *Hart*, 124 Mass. 123, 125. *Hills* v. *Snell*, 104 Mass. 173, 177. *Boston* v. *Binney*, 11 Pick. 1.

The result is, that the claim was properly disallowed against the estate of the firm; and this is the only question before us. In respect to this, therefore, the entry must be,

Appeal dismissed.

COMMONWEALTH *vs.* FRANK FERRY.

Suffolk. February 3, 1888. — February 29, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, & KNOWLTON, JJ.

Complaint — Certainty — Duplicity — Pool — Evidence.

A pool is a combination of stakes, the money derived from which is to go to the winner.

The St. of 1885, c. 342, § 1, forbidding the "registering bets" or "buying or selling pools" on the results of various contests, describes but a single offence.

A complaint on the St. of 1885, c. 342, § 1, alleged that the defendant was present on a day certain, in a room equipped with "apparatus, books, and other devices," and was there engaged in the "business and employment of registering bets and selling pools" on the results of contests of speed between horses. *Held*, that the complaint was sufficient without a detailed description of the apparatus or of particular contests.

The averments "business and employment" and "registering bets and selling pools" in such a complaint do not render it bad for duplicity.

At the trial of such a complaint, on appeal, if the evidence as to the date of the offence corresponds with the allegation of the complaint, the jury, in the absence of proof to the contrary, may presume the offence proved to be the same as that of which the defendant was convicted in the lower court, especially if it appears that he there contended that there was not evidence enough to convict him of the offence on that day.

Evidence that the room was, during ten days prior to the date alleged, occupied for "registering bets and selling pools," is competent on the issue whether it was so kept on that date.

An instruction to the jury, that if the defendant was "present in any such place as that named in the statute, that is, any place like or similar" thereto, he would be guilty, could not have misled the jury into supposing that the defendant could be convicted unless he was present in a place of the character defined in the statute.

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COMPLAINT, under the St. of 1885, c. 342, § 1, by one Chase, to the Municipal Court of the city of Boston, alleging that at the time of the commission of the offence therein set forth a certain room in a certain building in Boston "was kept and occupied by some person whose name is unknown to said Chase, with apparatus, books, and other devices — a more particular description of said apparatus, books, and devices is to said Chase unknown — for the purpose of registering bets, and of buying and selling pools upon the results of trials and contests of skill, speed, and endurance of men, birds, beasts, and machines," and that the defendant, on May 28, 1887, "was present in said room, and then and there engaged in the business and employment of registering bets and selling pools upon the results of certain trials and contests of speed between contesting beasts, to wit, contesting horses."

In the Superior Court, on appeal, before the jury were impanelled, the defendant renewed a motion, which was made and overruled in the Municipal Court, to quash the complaint, for the following reasons: "1. That the complaint herein does not fully, plainly, substantially, and formally allege against him any crime or offence known to the laws of this Commonwealth. 2. Because the apparatus, books, and other devices referred to in said complaint are not described, nor are the uses and purposes for which they were designed and intended set forth; nor is it alleged in said complaint that said apparatus, books, and other devices were not intended and designed for use for lawful purposes. 3. Because said defendant is therein charged with being engaged in both the business and employment therein set forth. 4. Because the defendant is therein alleged to have been engaged in the business and employment of both registering bets and selling pools. 5. Because the method or manner of registering the bets and selling the pools, referred to in said complaint, is not stated or described, and because said bets and pools are not defined or described; nor are the facts and circumstances connected with the alleged registering of bets and selling of pools, referred to in said complaint, set forth or referred to. 6. Because the trials and contests of speed between contesting beasts, viz. contesting horses, therein referred to, are not sufficiently described; and because said contesting beasts, viz. con-

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testing horses, are not sufficiently described. *Bacon*, J., overruled the motion.

At the trial, the first witness called by the government testified to numerous visits to the room between May 18 and May 28, 1887, inclusive, and that upon these occasions the defendant was present in the room, and engaged in doing certain things specified by the witness, which tended to show that the defendant was then and there engaged in the business named in the complaint. The defendant objected to the admission of evidence connecting the defendant with the room upon more than one date, and demanded that the government should elect a particular date upon which it would rely. The judge ruled that the evidence objected to should be admitted for the purpose of showing the character of the business carried on in the premises, and declined to order the government to elect a particular date upon which it would rely for conviction until all the evidence was in. When the evidence was in, the government elected May 28, 1887, as the date upon which it would rely. In his charge to the jury, the judge referred to the evidence which had been admitted, as to what took place in the premises at different times from that named in the complaint and relied upon by the government, and instructed the jury that they should consider it only as it related to the question whether the premises were kept for the purpose named in the complaint on May 28, and for that purpose alone.

Upon cross-examination of the government's witnesses, it appeared that in the court below evidence was introduced tending to show that the defendant was engaged in the business named in the complaint in the premises referred to upon several dates other than May 28, and a stenographer, called by the defendant, on cross-examination, produced a memorandum made by him in the trial below, that counsel for the defendant "claimed that the evidence was not sufficient to prove that any offence was committed on the date named." The defendant requested the judge to order a verdict for the defendant, on the ground that the government had failed to show that the offence upon which it sought to convict the defendant in the Superior Court was the identical offence upon which he was convicted in the court below; but the judge declined so to rule.

The defendant requested the judge to require the government

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to elect whether it would ask the jury to convict the defendant of being in the business, or in the employment, referred to in the complaint; and also whether he would ask the jury to convict the defendant of being engaged in the business or employment of buying or selling pools, or in that of registering bets. The judge declined to comply with this request, and ruled that, if the defendant was proved to have been engaged either in the business or employment of buying or selling pools or registering bets he might be convicted.

The defendant requested the judge to instruct the jury as follows: "1. In order to convict, the jury must find every element present in the case; viz. that the defendant was, upon the date named, present in a place or room fitted with apparatus, books, and other devices designed and intended for the purpose of registering bets and of buying and selling pools upon the results of certain trials and contests of speed between contesting beasts, to wit, contesting horses, and was then and there engaged in the business and employment of registering bets and selling pools upon the results of said trials and contests. 2. The things sold by the defendant, if he sold anything, must have been pools within the meaning of the statute, and that the following are standard definitions of a pool: 'the stakes played for in certain games'; 'the stake played for in certain games of cards.' 3. If the jury are not satisfied beyond a reasonable doubt that it was true, at the time the complaint was drawn, that Chase, the complainant, did not have and could not give a more particular description of the apparatus, books, and other devices in the premises named in the complaint than that contained in the complaint, there is a variance between the allegation and the proof, and the jury must acquit the defendant. If Chase had, and could have given, a fuller and better description of said apparatus, books, and devices, he was bound to do so, and the absence of it is fatal to the complaint. The offence must not only be proved as charged, but it must be charged as proved."

The judge declined so to instruct, but gave the following instructions: 1. In order to convict they must find every element present in the case; viz. that if the defendant, at the time named, was present in any such place as that named in the statute, that is, any place like or similar to that named in the

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statute, and was then and there engaged in any such business or employment as that named in the statute, he would be guilty. 2. A pool, generally speaking, is a combination of stakes; and within the meaning of the law, a pool is money that has been paid in by those who have bought a right in it, and which is to be paid over to the winner, if he gets the right number in a game of chance. 3. The character of the apparatus, books, and other devices referred to in the complaint, was immaterial, and need not be proved; and the evidence which had been offered by the defendant, tending to show that Chase, the complainant, at the time the complaint was made by him, had and could have given a more particular description of said apparatus, books, and devices than that contained in the complaint, was immaterial.

After a verdict of guilty, the defendant moved in arrest of judgment, assigning the same reasons as for the motion to quash. This motion was overruled; and the defendant alleged exceptions.

E. W. Burdett, for the defendant.

A. J. Waterman, Attorney General, (*H. C. Bliss*, Assistant Attorney General with him,) for the Commonwealth.

DEVENS, J. 1. The defendant contends that a more particular description of the apparatus, &c. used should have been given in the complaint, especially as it appeared at the trial that the complainant might have done this. But all such apparatus, books, &c. might have been, and probably were, entirely lawful and proper instruments in themselves; the important matter charged was that they were used for an unlawful purpose, set forth in the complaint. If this was alleged and proved, any detailed description of them was unnecessary.

2. The complaint is not bad for duplicity in charging the defendant with having been engaged "in the business and employment" forbidden by the statute. These words are used as substantially synonymous terms, to describe the transaction of registering bets and buying or selling pools. It would be an extremely forced construction to hold, as the defendant urges, that by the use of these two words he is charged with being both principal and agent, or as employer and employee.

3. Nor is the allegation in a single count, that the defendant was engaged in the business and employment of both "registering bets and selling pools," open to the objection of duplicity.

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They are not distinct kinds of unlawful business, but different parts of one transaction, representing different stages of it. In *Stevens* v. *Commonwealth*, 6 Met. 241, 242, it was held that the Rev. Sts. c. 126, § 20, prescribing the punishment of "every person who shall buy, receive, or aid in the concealment of any stolen goods, knowing the same to have been stolen," describes only one offence, which may be committed either by buying, receiving, or aiding in the concealment of such goods; and that an indictment which alleged that a defendant received and aided in the concealment of such goods charged but a single offence. A pool was, we think, correctly defined as a combination of stakes, the money derived from which was to go to the winner. Registering the bets and "buying or selling pools" would appear to be but one transaction.

If, however, they were distinguishable criminal acts, the indictment would not be bad for duplicity. In *Commonwealth* v. *Moody*, 143 Mass. 177, assuming that the registering of bets and the selling of pools were distinct offences, it was held that the offence of keeping a room for these various purposes was but a single one, and that it made no difference how many unlawful purposes the room was kept for.

The offence with which the defendant was charged was being present in a room of this character, kept by another person, aiding in the unlawful business there conducted, under the clause of the statute which renders culpable "whoever is present in any such place, engaged in any such business or employment." Whatever portion of the unlawful business there conducted he engaged in, he was guilty of the offence denounced by the statute, nor was he guilty of more than a single offence if he both registered bets and bought or sold pools.

4. It was not necessary to describe the method or manner of registering bets or selling pools, or the particular contests which were made the subject of gambling. The defendant was sufficiently informed of the charge against him, although the indictment did not go into this minute detail.

5. At the trial, the defendant objected that it was not sufficiently shown that the offence for which the defendant was tried in the Superior Court was the same of which he had been convicted in the lower court. The government relied in the Supe-

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rior Court upon May 28, as alleged in the complaint, as the day of the offence. Where the evidence corresponds with the allegation in the complaint, the jury, in the absence of proof to the contrary, may presume the offence proved to be the same as that of which the defendant had been convicted in the lower court. *Commonwealth* v. *Field*, 119 Mass. 105. It was shown, also, that the defendant had contended in the lower court that there was not sufficient evidence to convict him of the offence upon the day named, which indicated that the day alleged was the day there relied on by the prosecution.

6. Evidence was admitted that at various times between May 18 and May 28 the defendant was present at the room described, engaged in doing certain things which tended to show he was engaged in the business alleged in the complaint. The presiding judge received this evidence, not requiring the government to make its election until the evidence was in as to which date it should rely upon. He then directed the jury to consider the evidence as to what occurred at other dates previous, as bearing only upon the question whether the premises were kept for that purpose on May 28. The character of the room was a vital point in the case, as the defendant was only to be held guilty under the statute if he had engaged in the business in a room kept or occupied for the unlawful purpose described.

For the limited object of showing this, evidence as to the business conducted there immediately previous to the date in question was competent. The offence of keeping and occupying such a room is a continuing one, and as relevant to the inquiry whether the room was kept on May 28 for the unlawful purpose of registering bets and selling pools, evidence that this business was there conducted at various times during the ten days previous had a legitimate bearing. *Commonwealth* v. *Carney*, 108 Mass. 417. It could not be excluded because it had also a tendency to show that the defendant was at other times engaged in assisting in it. We must assume that the jury received this evidence only to the limited extent allowed by the judge, that of ascertaining the character of the room described.

7. The defendant requested the judge to instruct the jury, that, in order to convict, the jury must find every element present in the case; viz. that the defendant was, upon the date named,

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present in a place or room fitted with apparatus, books, and other devices designed and intended for the purpose of registering bets and of buying and selling pools upon the results of certain trials and contests of speed between contesting beasts, to wit, contesting horses, and was then and there engaged in the business and employment of registering bets and selling pools upon the results of said trials and contests. The judge declined so to rule, but instructed the jury, that in order to convict they must find every element present in the case; viz. that if the defendant, at the time named, was "present in any such place as that named in the statute, that is, any place like or similar" to that named in the statute, and was then and there engaged in any such business or employment as that named in the statute, he would be guilty. To this ruling and refusal to rule the defendant excepted.

The ruling as given, while it met the request of the defendant fairly in the main, is in one respect unfortunately phrased in using in reference to the place, where the defendant must have been found aiding in the unlawful act charged, the expression, "that is, any place like that or similar to that named in the statute." This is preceded, however, by the words "any such place as that named in the statute, that is," &c. It is evident that the judge used the phrases as synonymous with each other, and that it could not have been supposed by the jury that the defendant could have been convicted unless he was present in a place clearly and distinctly of the character defined in the statute. The argument of the defendant is, that it might have been inferred by the jury that, if the place bore a likeness or similarity to that described in the statute, while yet it differed therefrom, the defendant might be convicted. Connected as it was with the previous expression, we do not think this misunderstanding could have arisen. If not, this verbal inaccuracy, to which the judge's attention was not called, can have done the defendant no harm.

Other exceptions taken by the defendant, as well as the numerous reasons assigned in arrest of judgment, which were identical with those stated in the motion to quash, have been considered so far as seemed desirable with those already discussed.

Exceptions overruled.

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F. OTTO SCHRAMM & another *vs.* BOSTON SUGAR REFINING COMPANY.

Suffolk. January 10, 1888. — March 1, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Contract — Sale — Broker — Rescission — False Representation — Evidence.

An agreement to ship sugars "per Swedish schooner Sylphide" is satisfied by a shipment by a vessel of that name which in Sweden would be called a "schooner," but here a "topsail schooner."

A contract of sale of an unselected article cannot be rescinded at law or in equity because, prior to the making thereof, an honest expression of opinion is made, or a statement of fact not purporting to be of knowledge, that the article when selected will be of a better quality than it proves to be.

A broker in good faith offered for sale to the agent of a refining company a cargo of sugars to be shipped of "eighty-four degrees test" by the polariscope, and a contract of sale was thereupon entered into which provided for that test as a "settlement basis," the price to be adjusted in accordance with variations therefrom. The actual test varied a number of degrees from that named, and, the refining company declining to accept the sugar, an action was brought for breach of contract. *Held*, that there was no evidence of a false representation of fact by the broker inducing the contract.

Evidence that the price of an article has fallen, between the date of a contract of sale and the time of delivery, may be competent to prove the market value; and the concession of the fact will not make it incompetent.

CONTRACT for breach of the following agreement: "Boston, December 24, 1885. Sold for account of Messrs. Schramm & Co., Maroim, Brazil, through Messrs. Smith and Schipper, New York, representing, to the Boston Sugar Refining Company, Boston, a cargo of about four hundred tons more or less of Maroim brown sugars at five and one eighth cents per pound, duty paid, landed terms. Less $2\frac{1}{2}$ per cent payable in cash ten days from average date of delivery. Sugar to be shipped per Swedish schooner Sylphide (or in case of disaster to that vessel by another vessel) to Boston during January or February, 1886. Settlement basis 84° test, allowance at rate of $\frac{1}{10}$ c. per degree down, $\frac{1}{16}$ c. per degree up, fractions of a degree pro rata."

At the trial in the Superior Court, before *Blodgett*, J., it was admitted that the contract was made by the defendant's agent with one Verplanck, a broker, who represented in Boston Smith and Schipper, the plaintiff's agents in New York. The parties

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agreed that the clause in the contract, "Settlement basis 84° test, allowance at rate of $\frac{1}{10}$ c. per degree down, $\frac{1}{16}$ c. per degree up, fractions of a degree pro rata," referred to a test of the cargo by the polariscope, and provided for an adjustment of the price according to the test, five and one eighth cents per pound to be paid in case the cargo tested 84°, and $\frac{1}{10}$ of a cent per pound less, and $\frac{1}{16}$ of a cent per pound more, in case of variation from that test.

The plaintiffs introduced evidence tending to show that the Sylphide was loaded at Aracaju, the port of Maroim, in Brazil, between February 17 and 20, 1886, with a cargo of Maroim sugar (which was manufactured during the months from October, 1885, to January, 1886), and that she arrived in Boston, with her cargo in good condition, on March 30, 1886; that her cargo was landed and placed in the warehouse of the defendant; and that, on being tested with the polariscope in the manner required by the contract, it tested $79\frac{12}{100}°$; after which the defendant wrote to Smith and Schipper, the agents of the plaintiffs in New York, that the sugar was not a proper quality to have shipped under the contract, and declined to receive it.

It was admitted that the parties afterwards by agreement sold the cargo without prejudice, and that the net proceeds were applied to the reduction of the plaintiffs' claim, the difference between the contract price and the net proceeds of the sale being $3,929.88, which amount it was agreed that the plaintiff was entitled to recover, if entitled to recover at all.

The plaintiffs read in evidence the deposition of the captain of the Sylphide, which set forth that he was in command of the "brig Sylphide. I have been in command of her from June, 1885, when she was launched. We call it a schooner in Sweden; here you call it a brigantine or topsail schooner." And the defendant requested the judge to rule that the plaintiffs had not made out a case, because they had not shown that the cargo was shipped by a schooner called the Sylphide; but the judge refused so to rule, saying that the description was well enough upon the evidence, and that, if the defendant had any right to insist upon any variance, it had waived it.

The defendant contended that it was induced to make the contract by false and fraudulent representations made to it by

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Verplanck, who acted for the plaintiffs in negotiating the sale, and further relied on the untruth of these representations inducing the contract, as constituting a defence in equity. One Foster, the president of the defendant company, testified that he conducted the negotiation for the purchase of the sugar named in the contract with Verplanck; that he knew that the crop of sugar at Maroim was a crop that came in from October to January; that "Verplanck offered me a cargo of sugar coming from the port of Maroim, in Brazil, and described that cargo to me as eighty-four test sugar"; and that "a variation of one degree nothing would be said about; I think a variation of two degrees they might complain; anything more than that would be serious; anything more than that, I think they would try to get an allowance on it." On cross-examination, he testified that Verplanck "offered to me a cargo of Maroim sugars of eighty-four degrees test"; that he could not describe Verplanck's language fully, but that that was his best recollection; that "possibly, it would n't be out of the way," though he did not remember, Verplanck might have come to him with a telegram stating, "You are authorized to offer a cargo of sugar ex Sylphide from Maroim, 84° settlement basis, a sixteenth up and a tenth down"; and that he did not think that Verplanck had been guilty of any fraud, and that he did not think that he would be.

The defendant's counsel admitted to the court that he had no evidence to show that Verplanck or Smith and Schipper knew at the time of the sale that the quality of the cargo was not as defendant claimed it was stated by Verplanck, or that the crop of Maroim sugar for that year was an inferior one; and the plaintiffs admitted that they had not informed Smith and Schipper, when authorizing them to sell this cargo, or prior to such sale, that the crop of Maroim sugar that year was inferior.

At the conclusion of this testimony, the judge asked the defendant's counsel whether he intended to change the testimony, or to offer any other evidence of fraudulent representations to support the defence on this point; and the defendant's counsel having stated that he did not, the judge said, "I will not say that there is not some evidence of a misstatement of fact" in regard to the cargo, but ruled that there was no evidence to support the defence on this point, and that the defendant had failed to

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establish the equitable defence on which it relied; to which ruling the defendant excepted.

The witness Foster was asked, on cross-examination, whether the market price of sugar had not fallen between the time of the contract and the time when the cargo in question was landed, and answered, first, that he did not remember, and finally, that he thought it had, but could not say how much; and Verplanck, when asked how much the market price of sugar had fallen between the date of the contract and the date when this cargo arrived, answered, "Three eighths of a cent," and said that the amount claimed by the plaintiffs was in fact the difference between the contract price and the market price of the sugar, and was seven sixteenths of a cent a pound less than the contract price. The defendant objected to the admission of this evidence, but the judge admitted it.

The defendant further contended, upon the evidence, first, that the sugar delivered was not Maroim sugar; secondly, that there was a usage in the sugar trade in Boston by which the defendant, under a contract like the one in suit, was entitled to reject the sugar, if, when tested by the polariscope, it did not show the test within two or three degrees of the settlement basis fixed in the contract; but the judge, without objection from either party, submitted to the jury, as the only questions of fact in issue, whether the sugar delivered was Maroim sugar, and whether the usage upon which the defendant relied existed, under instructions to which no objection was taken.

The jury found for the plaintiffs; and the defendant alleged exceptions.

D. E. Ware, for the defendant.

M. Storey, for the plaintiffs.

FIELD, J. The jury have found, under instructions to which no exception was taken, that the sugars delivered were Maroim brown sugars, within the meaning of the contract, and that there was no usage by which the defendant was entitled to reject the sugars because they fell below the test, which the contract made the basis of settlement, by more than two or three degrees of the polariscope.

It is plain that the sugars were shipped by the vessel intended by the parties to the contract; that this vessel might well have

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been called a Swedish schooner; that the defendant did not refuse to receive the sugars because the vessel carried some square sails; and that this fact was immaterial.

The defendant contends that there was evidence of a false representation of fact made by the agent of the plaintiffs whereby the defendant's agent was induced to make the contract. If any such representation was made, it was made by Verplanck, the broker, and it is said that there was evidence that a representation was made by him that the sugars were "of eighty-four degrees test." "The defendant's counsel admitted to the court that he had no evidence to show that Verplanck or Smith and Schipper knew at the time of the sale that the quality of the cargo was not as defendant claimed it was stated by Verplanck." There was no evidence that the plaintiffs knew that Verplanck ever made any such representation, or ever authorized him to make any such representation. The contention is, that if Verplanck, as agent of the plaintiffs, made a positive representation of fact, although he was not authorized by them to make it, and they did not know that he had made it, and although he believed it to be true, yet, if the defendant's agent relied upon it in making the contract, the defendant could rescind the contract, if the representation was actually false. If we assume that this is the law, we are yet of opinion that the evidence recited in the exceptions would not have warranted the jury in finding that Verplanck made any statement which was, or was understood by the defendant's agent to be, a positive representation of an existing fact relating to an ascertained lot of sugars.

There was no evidence that there was an ascertained lot of sugars in existence which Verplanck offered to sell, or that the defendant's agent who made the contract understood that Verplanck represented that there was such a lot of sugars which would test exactly eighty-four degrees. It appears that the defendant's agent clearly understood that the sugars when selected and put on board would vary somewhat from this test, and no contract was made limiting the extent of this variation, and no representation that it would not exceed any definite limit. So far as appears, Verplanck showed to the defendant's agent all the information he had concerning the sugars, and there is no evidence that the defendant's agent understood that Verplanck had any per-

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sonal knowledge of the quality of the sugars, or that he made any representation of the quality as of his own knowledge. If the plaintiffs made any representation, it was by the telegram, and that was not false. The contract contains no warranty of the quality of the sugars, and none could be shown by the oral testimony to add to or vary the terms of the written contract. Taking the most favorable view of the whole evidence that can be taken for the defendant, it amounts to this: that in December, 1885, Verplanck, as agent of the plaintiffs, offered for sale a cargo of about four hundred tons, more or less, of Maroim brown sugars, to be shipped by the Swedish schooner Sylphide in the following January or February, and that he in good faith said that they would, or that he thought they would, test about eighty-four degrees; and that, induced by this, the defendant's agent made the written contract in which eighty-four degrees was taken as the "settlement basis," and the price was agreed upon, with stipulated variations up or down if the sugars tested more or less than this.

Contracts of sale of articles thereafter to be selected cannot be rescinded because before the making of the contracts there may have been an honest expression of opinion, or an honest statement of fact not purporting to be as of knowledge, that when the articles are selected in conformity with the contracts they will be of a better quality than they prove to be. We are not aware that in this Commonwealth there is in this respect any different rule in equity from that which obtains at law. *King* v. *Eagle Mills*, 10 Allen, 548. *Pike* v. *Fay*, 101 Mass. 134. *Litchfield* v. *Hutchinson*, 117 Mass. 195. *Ormrod* v. *Huth*, 14 M. & W. 651.

The measure of damages was the difference between the contract price and the market value at the time and place of delivery. If the evidence that the market price of sugars had fallen between the date of the contract and the time when the cargo arrived and was landed was admitted for the purpose of proving this market value, it may have been competent in connection with other evidence; the fact that the evidence was rendered unnecessary by the concession of the defendant does not make the admission of it a ground for a new trial. *Priest* v. *Groton*, 103 Mass. 530, 540. *Jennings* v. *Whitehead & Atherton Machine Co.* 138 Mass. 594. It does not appear that this evi-

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dence was admitted for any other purpose, and the objection taken is general. We cannot say that evidence of the amount of the fall in price of sugars generally was not some evidence of the amount of the fall in price of this particular kind of sugars. The defendant contends that it was prejudiced by the admission of this evidence, and that the plaintiffs' counsel might argue from it that the defendant refused to receive the sugars because they had fallen in price, and not because they did not test eighty-four degrees. The exceptions do not state that any such argument was made; but if it was, we cannot say that it was not legitimate, or that it could not as well have been made upon the concession of the defendant as upon the evidence.

Exceptions overruled.

DAVID N. SKILLINGS *vs.* MASSACHUSETTS BENEFIT ASSOCIATION.

Suffolk. January 13, 1888. — March 1, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Beneficiary Association — Creditor — Dependent — Statute.

A creditor of a member of a beneficiary association is not "dependent" within the meaning of the Pub. Sts. c. 115, § 8, (as enlarged by the St. of 1882, c. 195, § 1,) and a promise by the association to pay a sum due at a member's death to such a creditor is void.

Certificates of membership in a beneficiary association were issued in February and March, 1885, payable to a creditor of a member, who died in 1886. *Held*, in an action by the creditor thereon, that the St. of 1885, c. 183, relating to such associations, which took effect in May, 1885, did not apply, and that, the promise being void, it could not be determined to whom, if to any one, the sums due should be paid.

CONTRACT to recover $7,000 upon two certificates of membership issued by the defendant on the life of Edward A. Clapp. The declaration alleged that the certificates were issued on February 18, 1885, and March 9, 1885, respectively, and were payable to the plaintiff; and that Clapp died on February 3, 1886.

At the trial in the Superior Court, before *Bacon*, J., the plaintiff offered in evidence the certificates, the fact of the death of

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Clapp, and proofs of death, in conformity with the contract. The defendant put in evidence the application of Clapp to become a member of the defendant association, which stated that the contract was made for the benefit of the plaintiff, and that the plaintiff was "dependent."

The defendant contended that, as the plaintiff was not a relative of Clapp, but only a creditor, which facts the plaintiff admitted, he was not, within the meaning of the Pub. Sts. c. 115, § 8, dependent; and asked the judge to rule that, under these circumstances, the plaintiff was not dependent, and that the action could not be maintained.

The judge ruled as requested, and ordered a verdict for the defendant; and the plaintiff alleged exceptions.

R. M. Morse, Jr., for the plaintiff.

E. Avery & A. E. Avery, for the defendant.

FIELD, J. The exceptions in this case are meagre, but it appears that the defendant was an association doing business under the provisions of the Pub. Sts. c. 115, and that it issued two certificates of membership on the life of Edward A. Clapp for sums of money to be paid on his death to the plaintiff, who was described in the application as "dependent." The plaintiff was not a relative of Clapp, and his only relation to him was that of a creditor. The declaration alleged that the certificates were issued on February 18, 1885, and March 9, 1885, respectively, and that Clapp died on February 3, 1886. The reference in the exceptions to the Pub. Sts. c. 115, plainly shows that this is a corporation organized "for the purpose of assisting the widows, orphans, or other persons dependent upon deceased members." Pub. Sts. c. 115, § 8; St. 1877, c. 204; St. 1874, c. 375.

The powers of corporations organized under these statutes were enlarged by the St. of 1882, c. 195, § 1, so as to include among the persons to be benefited other relatives of deceased members besides widows and orphans. A person whose only relation to the deceased member is that of a creditor is not a person dependent upon him within the meaning of these statutes, and the promise to pay the plaintiff is void. Such a promise is beyond the powers of the association, and contravenes the intention of the statutes under which the association was organized. The plaintiff cannot therefore maintain an action on this prom-

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ise, either for his own use, or for that of any other person. *Briggs* v. *Earl*, 139 Mass. 473. *American Legion of Honor* v. *Perry*, 140 Mass. 580.

The St. of 1885, c. 183, passed after these certificates were issued, does not affect the case, for these among other reasons: that it does not distinctly appear that this corporation was such an organization as could avail itself of the rights, powers, and privileges conferred by this act (§ 1); or if it could, that it had ever done so; or that it had done anything that could make valid the promise to pay the plaintiff which was void when it was made.

As the designation of the plaintiff as the person enabled to receive the sums payable on the death of Clapp is void, we cannot determine in this suit to whom they should be paid, if payable to any one. *Exceptions overruled.*

SETH W. BOYNTON *vs.* SHAW STOCKING COMPANY.

Middlesex. January 16, 1888. — March 1, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Libel — Construction — Character.

The publication of an article by a manufacturer cautioning the public not to form an opinion of goods of his manufacture from those advertised by a tradesman as of "first quality," since they were sold to him as "damaged," is not actionable as an imputation on the tradesman's character.

TORT for an alleged libel contained in the following words: "Caution: An opinion of Shaw knit hosiery should not be formed from the navy blue stockings advertised as of 'first quality' by Messrs. S. W. Boynton & Co. at 12½ cts., since we sold that firm at less than ten cents a pair some lots which were damaged in the dye-house. [Signed] Shaw Stocking Company. Lowell, May 29, 1886."

At the trial in the Superior Court, before *Thompson*, J., the plaintiff offered evidence tending to prove the following facts:

The plaintiff was the proprietor of a dry goods store, and did

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a large business in Waltham, under the style of S. W. Boynton & Co., his customers also coming from the surrounding towns and cities. He had for several years purchased stockings manufactured by the defendant. On May 3, 1886, one Guild, who sold goods of the defendant on commission, called at the plaintiff's place of business and represented that he had a large stock of navy blue first quality Shaw knit stockings to sell, which were in such sizes that the defendant would sell them cheap, as it desired to reduce its very large stock. The plaintiff examined samples of the stock then in Guild's possession, which were first quality navy blue Shaw knit stockings, and, after being assured by Guild that the stock was like the samples and of the very first quality, purchased one hundred dozen pairs. After the receipt of the stockings, and after examining them, the plaintiff caused to be inserted in six issues of "The Charles River Laborer," a weekly paper published in Waltham, and having a large circulation in that place and in surrounding towns and cities, the following advertisement: "Shaw Knit Hose, navy blue, size 8 to 11, first quality goods, at 12½ cts. per pair." Afterwards, the defendant caused the alleged libel to be inserted in six issues of "The Waltham Daily Tribune," a newspaper published in Waltham, and having a large circulation therein and in the surrounding cities and towns.

The plaintiff also offered evidence tending to show that the stockings had not been damaged in the dye-house, and that they were not damaged in any other respect, but were first quality stockings, which the defendant well knew.

On the evidence, the judge ruled that the action could not be maintained, and directed a verdict for the defendant; and the plaintiff alleged exceptions.

T. Curley, for the plaintiff. 1. The question of libel or no libel should have been left to the jury, according to the rule laid down in *Twombly* v. *Monroe*, 136 Mass. 464. See *Baylis* v. *Lawrence*, 11 Ad. & El. 920; *Donaghue* v. *Gaffy*, 54 Conn. 257.

2. The natural and necessary meaning of the words contained in the defendant's publication is defamatory of the plaintiff, particularly if taken in connection with the plaintiff's advertisement. Whatever words have a tendency to hurt or are calculated to prejudice a man who seeks a livelihood by any trade or

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business are actionable. *Whittaker* v. *Bradley*, 7 D. & R. 649. *Fowles* v. *Bowen*, 30 N. Y. 20. *Orr* v. *Skofield*, 56 Maine, 483. *Weiss* v. *Whittemore*, 28 Mich. 366. See Odgers, Libel and Slander, 30, 31; *Harman* v. *Delany*, 2 Strange, 898; *Jenner* v. *A'Beckett*, L. R. 7 Q. B. 11.

J. N. Marshall, for the defendant.

C. ALLEN, J. An action will not lie for mere disparagement of the plaintiff's goods, without averment and proof of special damage. *Dooling* v. *Budget Publishing Co.* 144 Mass. 258. But the plaintiff contends that the words used by the defendant contain an imputation upon his character, and that they imply that he was deceiving the public by advertising goods as of first quality which he knew were damaged. The question, therefore, is this: Taking the words in their natural sense, and without a forced or strained construction, do they contain this imputation? If the words may fairly bear that meaning, then the case should have been submitted to the jury; otherwise not. *Twombly* v. *Monroe*, 136 Mass. 464. *Simmons* v. *Mitchell*, 6 App. Cas. 156. *Capital & Counties' Bank* v. *Henty*, 7 App. Cas. 741, 744, 771, 772, 790, 793.

We are of opinion that the words, fairly construed, do not bear that meaning, and that, in order to reach such a construction, it is necessary to include something which the defendant did not say, and which its words do not imply. No doubt a case might be imagined where, from peculiar circumstances, — as, for example, from the nature of the article offered for sale, or from the long continued habit of selling goods of a different character or quality from that represented, — it would be a natural inference from a charge otherwise like that which is the subject of this action, that the party was practising fraud or imposition, or was guilty of trickery or meanness. In the present case, such an inference does not naturally arise, and the object of the defendant's advertisement, judging from its language, appears to have been rather to uphold and maintain the character of its goods than to attack the plaintiff's character. The court might properly withdraw the case from the jury. See *Boynton* v. *Remington*, 3 Allen, 397; *Evans* v. *Harlow*, 5 Q. B. 624; *Solomon* v. *Lawson*, 8 Q. B. 823. *Exceptions overruled.*

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DAVID TAYLOR *vs.* ARVILLA LEWIS & trustee.
LEANDER L. GIBSON, administrator, *vs.* NELSON G. LEWIS & another.

Middlesex. January 20, 1888. — March 1, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Promissory Note — Payment — Administrator — Evidence.

An agreement by an heir with an administrator that notes held by the latter may be deducted from her distributive share before the final settlement of the estate will not amount to payment of the notes.

TWO ACTIONS OF CONTRACT. The first case, in which the plaintiff in the second case was summoned as trustee of the principal defendant, was to recover a balance due on two promissory notes made by Arvilla Lewis to Leander L. Gibson, and transferred by him to the plaintiff. The second case was to recover a balance due upon a promissory note made by Nelson G. Lewis and Arvilla Lewis to Susan Gibson, the plaintiff's intestate. The answer in each case set up, among other defences, that of payment.

The cases were tried together in the Superior Court, before *Knowlton*, J., who allowed a bill of exceptions, which, so far as material, was as follows:

It was admitted that Susan Gibson died on October 19, 1884, and that Leander L. Gibson was duly appointed the administrator of her estate on November 11, 1884; that Arvilla Lewis, the wife of Nelson G. Lewis, was an heir at law of Susan Gibson, and entitled to a distributive share in her estate, which she had never assigned or disposed of; and that Leander L. Gibson had never rendered any account as such administrator.

The defendants, to prove payment, offered evidence that in June, 1886, Arvilla Lewis and Leander L. Gibson made an oral agreement that the balance due on the notes should be deducted from her distributive share of the estate of Susan Gibson before final settlement, in payment of the same, and that the agreement had never been annulled.

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The plaintiff objected to the introduction of this evidence, and the judge, at his request, ruled that it was immaterial and incompetent, and excluded it. The jury returned a verdict for the plaintiff in each case; and the defendant alleged exceptions.

S. Haynes, for the defendants.

C. S. Hayden & S. L. Graves, for the plaintiffs.

C. ALLEN, J. The only question in these cases is, whether the plea of payment was supported by the evidence offered. There was no declaration in set-off, and no averment of an agreement for a set-off. Set-off can only be pleaded in the manner prescribed by statute; Pub. Sts. c. 168, § 16; and an answer must set forth in clear and precise terms each substantive fact intended to be relied on in avoidance of the action. Pub. Sts. c. 167, § 20. The statutes and the practice of the courts are very liberal in respect to allowing amendments, but in these cases there was no amendment to the answer, and no averment in the answer which the offered evidence was thought to support, except that of payment. And we are of opinion that the facts offered to be proved were not sufficient to show a payment. The estate in the hands of the administrator had never been settled, no account had been rendered, and of course it had not been ascertained what Mrs. Lewis's distributive share would amount to. Her counsel now assumes in argument that it would amount to more than the sums due upon the notes. But this is not conceded, and it was not included in the offer of proof; and if it had been, it is at least doubtful whether it would have been sufficient to establish a payment. The difficulty is, that there was no agreement for an actual present setting-off of one debt against the other. There was, upon the offer, merely an executory agreement that the notes should be deducted from her distributive share, in payment of the same, to be taken therefrom before the final settlement of the estate. The time had not come for carrying this agreement into execution, by making the actual application of the notes as contemplated. The notes were left as good subsisting notes, capable of passing by indorsement. It was not an agreement for a present deduction or set-off, but for one in the future. The notes were not extinguished or paid by the agreement that in the future, and before the

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final settlement of the estate, they should be deducted from her distributive share. *Dehon* v. *Stetson*, 9 Met. 341. *Cary* v. *Bancroft*, 14 Pick. 315. See also *Livingstone* v. *Whiting*, 15 Q. B. 722; *Callander* v. *Howard*, 10 C. B. 290.

Exceptions overruled.

KNOWLTON S. CHAFFEE *vs.* MIDDLESEX RAILROAD COMPANY.

MANUFACTURERS' FIRE AND MARINE INSURANCE COMPANY *vs.* SAME & another.

Suffolk. November 18, 1887. — March 2, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Bonds — Coupons — Days of Grace — Election — Shares of Stock — Damages — Specific Performance.

Bonds for the payment of money and interest coupons thereon are not entitled to grace.

If bonds issued by a corporation provide for payment at maturity, in money or in shares of stock at the option of the holder, the former to be raised from a sale of the latter, time is of the essence of the contract, and a bondholder who on Monday, the day of maturity being Sunday, offers his bonds for conversion into shares, is too late.

A corporation issued bonds payable by statute in money or in shares of stock at or before maturity at the election of the holder, and, the bonds maturing on Sunday, at three o'clock on the Saturday afternoon before, that being the close of its business hours, sold and transferred to a trust company all the shares uncalled for and legally issuable for money to redeem the outstanding bonds. A bondholder was told, when he applied at the treasurer's office at about ten minutes after three o'clock to convert his bonds into shares, that he was too late, and did not in consequence present his bonds for conversion on that afternoon. On Monday he surrendered his bonds for their par value in money, not waiving thereby any rights to the shares or to their value. Subsequently the bondholder brought a bill in equity against the corporation for relief, and, upon its being merged in another corporation, joined the latter as a party defendant. *Held*, that he had seasonably exercised his right of election, and that he was entitled, not to specific performance, but only to the market value of the shares at the maturity of the bonds.

An insurance company which makes an investment in unauthorized bonds may enforce the payment of the bonds.

TWO BILLS IN EQUITY, alleging that the plaintiffs were the holders of bonds issued by the Middlesex Railroad Company,

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and dated February 1, 1875, each of which provided for the payment of the principal sum due thereon at the treasurer's office on February 1, 1885, "with interest at the rate of eight per centum per annum payable semiannually on the first day of August and February in each year, upon surrender of the interest warrants hereto attached as they become due," with a covenant for the issue "to said bearer or his order five shares in the capital stock of said company," upon "the surrender of this obligation to the treasurer of the company by the bearer, at the date of maturity of any interest warrant"; that twenty interest warrants were attached to each bond, each of which was, save the proper date and number, in form similar to the following: "$20. Interest warrant $20. The Middlesex Railroad Company will pay the bearer at the office of the treasurer in Boston twenty dollars on the first day of ——, being six months' interest on certificate of indebtedness No. —"; that the St. of 1880, c. 103, §§ 3, 4,* authorized the issue of new shares of stock, and legalized the issue of these bonds, providing for their redemption by or conversion into thirty-five hundred shares of the new stock; that the plaintiffs as such holders, on February 2, 1885, — February 1 being Sunday, — surrendered their bonds to the Middlesex Railroad Company, and demanded five shares of its capital stock for each bond, but it refused to issue such shares, and tendered in payment money to the amount of the par value of the bonds; and prayed that the Middlesex Railroad Company might be compelled to procure, issue, and transfer to the plaintiffs shares of its capital stock to the amount to which they were severally entitled.

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* The sections are as follows:

"Section 3. The Middlesex Railroad Company is hereby authorized to increase its capital stock to an amount not exceeding one million of dollars.

"Section 4. Three hundred and fifty thousand dollars of said stock shall be applied to the payment or redemption of the bonds of said company already issued under the following dates, to wit: — the first day of February, eighteen hundred and seventy-five, and the first day of July, eighteen hundred and seventy-seven, at or before maturity; and the issue of said bonds is hereby legalized and made valid, and the holders thereof may convert them into stock as said bonds mature, unless redeemed by the company before maturity."

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IN THE FIRST CASE, the bill was filed on February 26, 1885, and also alleged that the plaintiff was the holder of thirty bonds payable to "Knowlton S. Chaffee, or bearer." Hearing before *Holmes*, J., who found, among other things not material, that the plaintiff was informed when he surrendered his bonds, on February 2, 1885, that he was too late, as he should have made his offer and demand on Saturday, January 31, 1885; that the shares had all been sold for money with which to redeem the bonds; and that the plaintiff finally surrendered the bonds without waiving his rights to the stock or its value, if it had any; and reported the case for the consideration of this court.

IN THE SECOND CASE, the bill was filed on March 19, 1885, and also alleged that the plaintiff was the holder of fifty bonds, each of which was payable "to —— or bearer", and that on Saturday, January 31, 1885, the plaintiff gave notice of its desire to surrender its bonds for shares of stock, but was informed that it was too late, and that the shares would not then be issued. On January 7, 1887, the plaintiff moved to amend its bill by making the Boston Consolidated Street Railway Company, into which the Middlesex Railroad Company had been merged, a party defendant, and by adding a prayer that it might be compelled to transfer and deliver to the plaintiff shares of its capital stock equivalent to the number for which the first named defendant had been liable. At the hearing, before *C. Allen*, J., the following facts appeared:

The Middlesex Railroad Company had made an agreement with the International Trust Company, that all the new stock that had not been delivered for the bonds at the close of business hours on January 31, 1885, should be delivered to the trust company at an agreed price, to be used to redeem the bonds then delivered or outstanding. At three o'clock in the afternoon of Saturday, January 31, 1885, that being the close of business hours, the finance committee of the directors of the Middlesex Railroad Company sold for cash and transferred to the trust company six hundred and fifty-five shares, being the balance of the fifteen hundred shares appropriated by the St. of 1880, c. 103, for the bonds which had not been converted or required by the signified option of any bondholder, and, the price for these shares being then paid in cash, the shares were transferred.

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Afterwards, and before twenty minutes past three o'clock on the same afternoon, Samuel Appleton, the president of the plaintiff corporation, went to the office of the Middlesex Railroad Company, and told a clerk in the presence of the finance committee, composed of the president and two directors, that he had come to convert the fifty bonds held by the plaintiff. The clerk asked him if he had the bonds with him, and Appleton answered that he had not, that they were in the Union Safe Deposit Vaults, and that the usual hour for closing the vaults had passed, upon which the clerk informed him that it would be necessary to have the bonds. Appleton then asked to see the president of the Middlesex Railroad Company, and, as he stepped forward, said to him that he wanted to convert the bonds held by the plaintiff. Powers, the president, then told him that at three o'clock all stock which had not been taken up by the conversion of bonds had been sold and transferred to a third party; that it was too late to convert the bonds into stock, but that they would pay the bonds in cash. Appleton then left, and returned to the office of the Middlesex Railroad Company at five minutes after four o'clock, and, finding the door closed, dropped through a slit in the door the following letter:

"January 31, 1885. To the President of the Middlesex Railroad Co., Boston. Dear Sir, — Having called at your office this day at 3.20 P. M. and demanded a conversion of ($25,000) Twenty-five Thousand Dollars, face value, of bonds of your Company due and convertible on February 1st, 1885, I hereby repeat said demand for conversion to said stock, to amount of 250 shares, as in bonds provided. Yours respectfully, Samuel Appleton, Pres."

The bonds were in the Union Safe Deposit Vaults, the usual hour for closing which was three o'clock; but, on application to the sub-manager, the vaults could have been opened by him and a clerk. In January, 1885, the sub-manager lived on Beacon Street, the clerk lived at the Norfolk House, and the president of the Middlesex Railroad Company also lived on Beacon Street.

The judge found, that at about ten minutes after three o'clock in the afternoon of January 31, 1885, Appleton was informed by the president of the Middlesex Railroad Company that it was

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then too late to present his bonds; that Appleton could and would have got his bonds and presented them on that afternoon, but for Powers's telling him that it was too late; and that under these circumstances the presentation of the bonds on that afternoon, at a little later time than ten minutes after three o'clock, was waived by the Middlesex Railroad Company.

On Monday, February 2, 1885, Appleton went to the office of the Middlesex Railroad Company with the bonds, and again demanded the shares to which the plaintiff was entitled on converting the bonds into stock, and surrendered the bonds with one coupon attached, receiving in exchange a check for $26,000, upon the agreement set forth in the following letter:

"Boston, 2 February, 1885. Samuel Appleton, Esq., President Manufacturers' F. & M. Ins. Co. Dear Sir, — I hand you herewith check for $26,000, being the amount of the fifty $500 bonds with coupon attached of the Middlesex R. R. Co., surrendered by your Company to the Middlesex R. R. Co. this morning, and I expressly reserve on behalf of the Middlesex R. R. Co. all the rights of the Manufacturers' M. & F. Ins. Co. to the stock of the Middlesex R. R. Co. which you have demanded in exchange for the bonds, and which I have refused to deliver, or for the value of such stock over and above the par value of the bonds surrendered; it being expressly agreed that the acceptance of the above sum of $26,000 by your company is not a waiver of its rights to the stock or its value, if it has any. Yours, Middlesex Railroad Co., by Chas. E. Powers, Prest."

The stock of the Middlesex Railroad Company had sold on the market in small lots, between December 1, 1884, and January 31, 1885, for prices ranging from 108¾ to 112.

On August 19, 1886, the Middlesex Railroad Company voted to increase its capital stock, the rights to subscribe to the new stock being valuable rights, which were sold on the market, and declared dividends of one and three quarters per cent each in April, July, and October, 1885, and of one and one half per cent each in January, April, and July, 1886. On August 21, 1886, by articles of consolidation duly executed and approved, the Middlesex Railroad Company and the Highland Street Railway Company were consolidated, and became a new corporation, called the Boston Consolidated Street Railway Company, each

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shareholder in the Middlesex Railroad Company being entitled to seven eighths of a share of stock in the new corporation for each share held by him. The Boston Consolidated Street Railway Company, on January 1, 1887, paid a dividend of four per cent. In January, 1885, there was no mortgage or pledge of the franchises of the Middlesex Railroad Company, and all bills for the construction thereof were paid; but at that time it owed money borrowed to pay, among other things, for an extension of its road, which branch had at that time been completed and paid for with the money borrowed.

The plaintiff contended that it was originally entitled, as against the Middlesex Railroad Company, upon surrendering the $25,000 and interest thereon, to have a decree for a certificate for 250 shares of stock, and to subscribe at par for $15\frac{62}{100}$ more shares, and for the payment of such sum as would amount to the dividends which had been declared on the 250 shares; that it was entitled to a decree against the Boston Consolidated Street Railway Company, upon surrender of the money, for a certificate for $232\frac{4}{10}$ shares; or that, if it was impossible for the defendants to comply with such decrees in whole or in part, it was entitled, by way of compensation, to the market value of the shares or rights to subscribe upon the date at which the market value of the shares of either corporation, or of the rights, had been highest between January 31, 1885, and the date of the decree.

The judge reported for the consideration of the full court the questions whether the plaintiff is entitled to the relief sought; whether the law as to investment of the funds of insurance companies prevented the plaintiff from obtaining this decree; and whether, if the plaintiff was entitled to compensation only, it should be based upon the value of the stocks and the rights to subscribe at the date of the decree, or, if at any other day, at what day. The case was to be sent to an assessor to determine the values mentioned, and such decree was to be entered as equity might require.

Samuel Hoar, for the plaintiff in the first case.

I. Bonds and coupons, payable to bearer, have all the qualities of commercial paper. These coupons, when severed from the bonds, are negotiable, and pass by delivery. They then cease to be incidents of the bonds, and become in fact inde-

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pendent claims. They possess the essential attributes of commercial paper. They are suable without the production of the bond. They are promissory notes, and are properly declared on as such, and, when overdue, will bear interest. *Spooner* v. *Holmes*, 102 Mass. 503, 507. *Haven* v. *Grand Junction Railroad*, 109 Mass. 88. *Hinckley* v. *Union Pacific Railroad*, 129 Mass. 52. *Thomson* v. *Lee County*, 3 Wall. 327, 332. *Aurora City* v. *West*, 7 Wall. 82, 105. *Clark* v. *Iowa City*, 20 Wall. 583. *Cromwell* v. *County of Sac*, 94 U. S. 351, 362. *Hodges* v. *Shuler*, 22 N. Y. 114. *Evertson* v. *National Bank of Newport*, 66 N. Y. 14. Pierce on Railroads, 107. 2 Ames on Bills and Notes, 774, note 5. Jones on Railroad Securities, §§ 320–326.

II. Negotiable interest coupons are entitled to days of grace, like other negotiable instruments payable at a given day, or on time; and therefore one purchasing them after the expiration of the time of payment specified, but before the expiration of the days of grace, is a purchaser before maturity; so a negotiable bond, payable at a given day, or on time, is entitled to days of grace. *Hodges* v. *Shuler*, 22 N. Y. 114. *Evertson* v. *National Bank of Newport*, 66 N. Y. 22.

III. Even if days of grace were not allowed on these bonds and coupons, the offer to surrender having been made by the plaintiff on the next business day after they became payable, he could be held guilty of nothing more than a mistake easily and honestly made; and it is submitted, that time is not so far essential to the contract that an absolute punctuality of performance is indispensable. *Todd* v. *Taft*, 7 Allen, 371.

W. C. Loring, for the plaintiff in the second case.

I. The plaintiff exercised its option of converting its bonds into stock within the time allowed it. The notice on Saturday coupled with the defendant's waiver was sufficient. The plaintiff had the whole of Saturday in which to exercise its option. Shaw, C. J., in *Gordon* v. *Parmelee*, 15 Gray, 413, 418. *Estes* v. *Tower*, 102 Mass. 65. *Dibble* v. *Bowater*, 2 E. & B. 564. *Hinton* v. *Duff*, 11 C. B. (N. S.) 724.

The rule as to business hours is the rule of the law merchant, and consists of two parts. 1. To charge an indorser of a negotiable paper, demand must be made on the maker, if not a banker, within reasonable hours, and, if he is a banker,

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within banking hours on the date when the paper becomes due. *Wilkins* v. *Jadis*, 2 B. & Ad. 188. *Farnsworth* v. *Allen*, 4 Gray, 453. But a demand after banking hours is good, if the banker is in fact found. *Garnett* v. *Woodcock*, 6 M. & S. 44. *Shepherd* v. *Chamberlain*, 8 Gray, 225. 2. The contract of the acceptor of a draft, or of the maker of a note, bearing days of grace, is to pay on demand on the third day of grace. Buller, J., in *Leftley* v. *Mills*, 4 T. R. 170, 174. Shaw, C. J., in *Gordon* v. *Parmelee*, 15 Gray, 413, 418.

II. Upon exercising its option within the time, the plaintiff became entitled as against the Middlesex Railroad to a decree for a certificate upon two grounds.

1. Upon converting its bonds into stock the plaintiff became a stockholder, and having become a stockholder he was entitled to a decree for the issue of a certificate: upon exercising its option to convert its bonds into stock the plaintiff became a stockholder; and the plaintiff became a stockholder by force of St. 1880, c. 103. Before the statute, the plaintiff could not have become a stockholder without the co-operation of the company; before the statute, the plaintiff had nothing more than a covenant that upon its exercising its option the company would issue stock to it. (The covenant was then invalid, but that is not material in this connection.) But that contract right was changed by the statute into a property right. The statute provided that the holders of the bonds "may convert them into stock as said bonds mature." Upon exercising its option, the plaintiff became a stockholder by force of the statute without the co-operation of the company.

The attempt to issue shares to others before the expiration of the time within which the plaintiff had the right to make its bonds stock, could not defeat this right of the plaintiff. An attempt to create shares without legislative authority is confessedly a nullity. In the case at bar there was no power given by the Legislature to increase the capital stock except by the conversion of bonds into stock, until the time had expired within which the stockholders had the right to convert their bonds into stock. Until that time had expired the only way of increasing the capital stock authorized by the Legislature was by the creation of new shares brought into being by bonds being converted into

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shares. So far as an attempt to create new shares in any other way was concerned, there was no more legislative authority than there would have been had there been an entire absence of legislative authority to increase the capital stock by issuing new shares, in which case an attempt to issue shares is confessedly a nullity. If the plaintiff became a stockholder, it was entitled to a decree for a certificate. Lowell, Transfer of Stock, §§ 240, 241. Parker, C. J., in *Chester Glass Co.* v. *Dewey*, 16 Mass. 94, 101. *Sewall* v. *Boston Water Power Co.* 4 Allen, 277. *Pratt* v. *Taunton Copper Co.* 123 Mass. 110. *Iasigi* v. *Chicago, Burlington, & Quincy Railroad*, 129 Mass. 46. *Child* v. *New York & New England Railroad*, 129 Mass. 170. Morton, C. J., in *Boston & Albany Railroad* v. *Richardson*, 135 Mass. 473, 474. *Rosenkrans* v. *Lafayette Railroad*, 18 Fed. Rep. 513.

2. If the plaintiff did not in fact become a stockholder, it became entitled to stock which could not be issued to any one else, and equity will therefore specifically compel the issue of the shares to the plaintiff. The St. of 1880, c. 103, did not give the Middlesex Railroad Company an absolute right to increase its capital stock at any time and in any way. The St. of 1880, c. 103, § 4, authorized an increase of the capital stock by the issuing of 3,500 shares, which "shall be applied to the payment or redemption of the bonds of said company already issued," — of which the plaintiff's bonds were confessedly a part.

The St. of 1880, c. 103, § 4, when it became a law, did not authorize an immediate issue of the 3,500 shares. The right to issue those shares did not arise until the holders of the bonds, to the payment or redemption of which these shares were to be "applied," presented their bonds for payment or redemption. Until the holders presented the bonds for payment or redemption, the railroad company had no right to issue a share of that stock. When the holders did present the bonds, the right to issue the 3,500 shares came into existence for the first time. If the holders on presenting the bonds had demanded payment for them, the right of issuing stock, which then had come into existence, would have been the right to issue the stock to third persons for cash. On the other hand, if the holders demanded that the bonds should be redeemed, the right of issuing stock thereby created would have been the right to issue the stock to

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the bondholders; that is, in that event the right of increasing the capital stock given by the St. of 1880, c. 103, would have been a right to increase it by issuing new shares to the holders of the bonds, and in no other way.

In the case at bar, in the event that has happened, the right of the Middlesex Railroad Company to issue the new stock appropriated to the plaintiff's bonds is precisely the same as it would have been had the St. of 1880, c. 103, gone no further than to authorize an increase of the capital stock by issuing new shares to the holders of the bonds, who elected to convert them into stock. The new stock cannot be issued to any one but the plaintiff, and the statute says it "shall be" issued to the plaintiff.

The attempt to issue these shares to a third person before any right to issue them in any way had come into existence was a nullity, and does not stand in the way of the plaintiff's right to a decree that these be issued to it.

L. M. Child, for the defendants.

FIELD, J. Before the St. of 1824, c. 130, a negotiable promissory note payable in this Commonwealth was not entitled to grace unless it was made expressly payable with grace. The St. of 3 & 4 Anne, c. 9, was never enacted here. *Jones* v. *Fales*, 4 Mass. 245. *Barker* v. *Parker*, 6 Pick. 80.

By the St. of 1824, c. 130, grace was allowed, in like manner as on foreign bills of exchange, on all bills of exchange payable at sight or at a future day certain within this State, and on all promissory negotiable notes, orders, and drafts payable at a future day certain within this State, "in which there is not an express stipulation to the contrary." Rev. Sts. c. 33, §§ 5, 6. Gen. Sts. c. 53, §§ 15, 16. Pub. Sts. c. 77, §§ 9, 10. It is only by virtue of this statute and its re-enactments that grace is allowed in this Commonwealth on promissory notes.

By the St. of 1852, c. 76, bonds or other obligations under seal for the payment of money issued by a corporation, or joint stock company, payable to bearer, or to some person designated or bearer, or payable to order, "are hereby made negotiable in the same manner and to the same extent as promissory notes are now negotiable." Gen. Sts. c. 53, § 6. Pub. Sts. c. 77, § 4. The bonds in these cases, even if it be conceded that they are bonds for the payment of money within the meaning of the

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statute are not entitled to grace. They are not in fact negotiable promissory notes within the meaning of the Pub. Sts. c. 77, § 9. Bonds for the payment of money at common law were not entitled to grace, and they cannot be held to have been included among the instruments described in the Pub. Sts. c. 77, § 9.

Whether these bonds are negotiable or not under the Pub. Sts. c. 77, § 4, is immaterial in these cases. If, by reason of the stipulation that they may be converted into stock at the election of the holder, they are excluded from the provisions of the Pub. Sts. c. 77, § 4, yet an assignee can maintain a suit in equity upon them in his own name. In the first suit, the bonds are payable "to Knowlton S. Chaffee, or bearer," and Chaffee is the plaintiff in the suit; in the second suit the bonds are payable "to —— or bearer," and it is found that the plaintiff became the holder and owner of them "on or prior to January 31, 1885." See *Chapin* v. *Vermont & Massachusetts Railroad*, 8 Gray, 575.

The Middlesex Railroad Company originally issued these bonds without authority of law, but the issue was subsequently ratified by the St. of 1880, c. 103, § 4. There were two series of bonds thus issued, and these bonds are a part of the first series. By this statute the holders of these bonds "may convert them into stock as said bonds mature, unless redeemed by the company before maturity." Each bond covenants that upon the "surrender of this obligation to the treasurer of the company by the bearer, at the date of maturity of any interest warrant, they will cause to be issued to said bearer or his order five shares in the capital stock of said company." The bonds were dated on February 1, 1875, and were payable on February 1, 1885, "with interest at the rate of eight per centum per annum, payable semi-annually on the first day of August and February in each year, upon surrender of the interest warrants hereto attached as they become due." As the first day of February, 1885, was Sunday, the bonds matured on January 31, 1885. Pub. Sts. c. 77, § 8.

It is contended that the interest warrants were entitled to grace, and that by the terms of the bonds, although not by the terms of the statute, the holders of the bonds could convert them into stock on the day when the last interest warrant became due, and that therefore the offer to surrender the bonds and the demand for the stock were made in time. It is not a reasonable

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inference that the company issuing the bonds intended that the last interest warrants, which purport to be payable on the same day as the bonds, should be entitled to grace when the bonds were not, and it is only as holders of the bonds that the plaintiffs are entitled to stock. Interest warrants, or coupons, in form like these, when detached from the bonds, have been considered as having many of the qualities of negotiable promissory notes; but we are of opinion that they are not negotiable promissory notes within the meaning of the Pub. Sts. c. 77, § 9. When interest is payable on a note or bond at fixed times, no grace is allowed. The device of separate detachable interest warrants, payable to bearer, has been adopted for convenience, and courts have invested them when detached with many of the qualities of negotiable promissory notes, to carry into effect the intention of the parties apparent on the face of the contract; but they purport to be only promises to pay certain sums of money as interest on the principal obligation. They are not in common speech called promissory notes, nor have they the same history, or in all respects the same characteristics, as promissory notes, and they could not have been within the contemplation of the Legislature in passing the St. of 1824, c. 130. Although we are confined to a consideration of the construction to be given our statutes, we do not wish to imply that, either by usage or the general law merchant, days of grace should be allowed either on the bonds or the coupons. We are not satisfied with the decision in *Evertson* v. *National Bank of Newport*, 66 N. Y. 14. See *Arents* v. *Commonwealth*, 18 Gratt. 750, 773; 2 Dan. Neg. Inst. (3d ed.), §§ 1505, 1506, and notes.

The reasons why days of grace were originally allowed on foreign bills of exchange payable at sight, or at a future day certain, have little application to bonds with coupons issued by a corporation to obtain money, which usually have a long time to run, and are commonly bought and held as an investment. Such bonds and coupons do not serve the purposes of commercial paper.

By the St. of 1880, c. 103, §§ 3, 4, the Middlesex Railroad Company was authorized to increase its capital stock to an amount not exceeding one million of dollars, and three hundred and fifty thousand dollars of this stock was to be applied to the payment or redemption of the two series of bonds at or before

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their maturity. Before this statute, it does not appear that the corporation had any stock which it could lawfully issue in payment or redemption of these bonds. It was important that the corporation should know on or before the maturity of the bonds whether the holders elected to take stock or money, because the stock which was not taken must be applied to the payment in money of the bonds, and this could only be done by selling the stock for money; and the money must be paid on demand, at the maturity of the bonds. Time was essential, and unless the holder of the bonds on or before their maturity presented his bonds and demanded stock, or at least offered to do this, he lost all right to receive stock on the maturity of the bonds. The defendant had the right to assume that all holders of bonds who desired stock would make the surrender on or before the maturity of the bonds, and to sell for money all stock not called for on or before that day. That the defendant actually sold all the stock which it could apply to the redemption of these bonds at three o'clock of the afternoon of January 31, 1885, without waiting until that day expired, is immaterial in the first suit; because, if it be conceded that the plaintiff had the whole of that day to present his bonds and demand the stock, he neglected to do this, and when he presented the bonds on February 2, 1885, it was too late.

The bill brought by Chaffee *Must be dismissed.*

In the suit brought by the Manufacturers' Fire and Marine Insurance Company there was evidence that, on the afternoon of January 31, 1885, between three o'clock and twenty minutes past three, Appleton, the president of the plaintiff corporation, went to the office of the defendant, and met there the clerk and president of the corporation with two of the directors, who with the president constituted the finance committee of the company and Appleton told them that he wished to convert the fifty bonds held by the plaintiff corporation into stock. The clerk asked him if he had the bonds, and Appleton answered that he had not, that they were in the Union Safe Deposit Vaults, and that the usual hour for closing the vaults had passed. The clerk then informed him that it would be necessary to have the bonds. Appleton then asked to see the president of the railroad company, and when he came forward Appleton said to him that

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he wanted to convert the bonds into stock. Powers, the president, "then told him that at three o'clock all stock which had not been taken up by the conversion of bonds had been sold and transferred to a third party, that it was too late to convert the bonds into stock, but that they would pay the bonds in cash." Appleton then left, and returned at five minutes before four o'clock, and, finding the door of the office closed, dropped a letter through a slit in the door, in which he demanded that the bonds should be converted into stock. It is also found as a fact, that "Appleton could and would have got his bonds and presented them on that afternoon but for Powers's telling him that it was too late, and that under these circumstances the presentation of the bonds on that afternoon at a little later time than ten minutes after three o'clock was waived by the Middlesex Railroad Company." On February 2, 1885, the bonds were presented at the office, and the stock demanded, and by agreement of the parties the bonds were received by the company, and a check for $26,000, being the par value of the bonds with the last interest warrants, was given to the plaintiff. This check was received by the plaintiff without waiving "its rights to the stock or its value, if it has any," above the par value of the bonds surrendered. The check was paid, and the plaintiff received the money, and in its bill offers to return it. The stock at that time was worth more than par. It is found as a fact, that at three o'clock on the afternoon of January 31, 1885, the Middlesex Railroad Company undertook to sell and transfer to the International Trust Company "six hundred and fifty-five shares [of stock] being the balance of the fifteen hundred shares appropriated by the St. of 1880, c. 103, for the bonds which had not been converted or required by the signified option of any bondholder mentioned above; that the price for these shares was then paid in cash, and the shares transferred." It appeared that the whole amount of the series of bonds issued by the company in the form and of the date of those owned by the plaintiff was one hundred and fifty thousand dollars, so that all the stock which the Middlesex Company could lawfully issue and deliver in exchange for the bonds of the plaintiff was in fact issued and transferred for cash to the International Trust Company at three o'clock in the afternoon of January 31, 1885.

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We know of no rule of law which required the plaintiff to present the bonds for redemption at the office of the treasurer before three o'clock of the afternoon of January 31, because that happened to be the time when the business office was usually closed for the day. We think that the bonds could have been presented there at any reasonable time on that day, and that on the facts found the Middlesex Railroad Company had seasonable notice on the day of the maturity of the bonds that the plaintiff elected, and was ready and willing, to convert them into stock.

The election to take stock in payment of a bond, however, does not make the bondholder a stockholder. His right to become a stockholder depends upon the performance of an executory contract by the corporation, and the bondholder is not a stockholder until the contract is performed. Whether a court of equity will specifically enforce the performance of the contract depends upon a variety of considerations. Executory contracts for the sale of stock which is commonly bought and sold in the market are not specifically enforced as a matter of course. Unless there are some equitable circumstances, the remedy at law is adequate. See Pom. Eq. Jur. § 1402 and notes. If it be true that bonds of corporations like these, which may be converted into stock at the election of the holder, are usually specifically enforced against a corporation, even although the stock is commonly bought and sold in the market, on the ground that this is a right against the corporation derived from statute, and that good policy requires that corporations should specifically perform their statutory obligations, yet a court of equity could not compel a corporation to issue stock for this purpose which it was not legally authorized to issue.

The cases where corporations have issued certificates of stock to assignees on forged transfers have no application. A certificate is evidence of the ownership of stock, and a forged transfer does not convey the stockholder's interest, and he remains a stockholder, and is entitled to his certificate and to all dividends in the same manner as if no new certificates had been issued to an assignee under a forged assignment. The difficulty courts find in dealing with *bona fide* holders of certificates issued on forged assignments is occasioned by the fact that the recognition of such certificates as valid would often create an over-issue of

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stock. The questionable practice which has sometimes been adopted of compelling the corporation to buy stock in the market, if the stock is commonly bought and sold in the market, and then of compelling a conveyance of it to the plaintiff, is in effect nothing more than compelling the corporation to pay as damages the market price of the stock at the time when the conveyance is ordered to be made. And if to this the intervening dividends are added, it is in effect assessing damages up to and as of the date of the decree, which is of the nature of specific performance.

It sufficiently appears by the report, that the stock of the Middlesex Railroad Company was bought and sold in the market at the time the bonds matured. We think that it also appears by the report, that the Middlesex Railroad Company had disabled itself before the bill was filed from issuing stock in payment or redemption of these bonds, and that the plaintiff knew this. This alone is sufficient to defeat specific performance, unless the International Trust Company could be compelled to surrender some of the stock transferred to it, and the Trust Company has not been made a party to the suit. When a contract is broken before the suit is brought, and the plaintiff knows this, and specific performance is impossible, damages are usually assessed as of the date of the breach, with interest from that time. There is another fact in the case which furnishes an additional reason why damages should not be assessed as of the date of the decree. The plaintiff received before the bill was filed the par value of the bonds in money, and has had the use of this money until the present time, which is more than three years. It also inferentially appears that since the filing of the bill, which was on March 19, 1885, all the stock of the Middlesex Railroad Company has been surrendered, under articles of consolidation entered into with the Highland Street Railway Company pursuant to the St. of 1886, c. 229, whereby a new corporation has been formed, called the Boston Consolidated Street Railway Company, which has been made a party to the suit.

It does not appear that the Boston Consolidated Railway Company has any stock which it can lawfully issue to the plaintiff in satisfaction of its claim. The conduct of the plaintiff in accepting $26,000, although with a reservation of its rights, is

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inconsistent with an absolute election on its part to take stock instead of money. The plaintiff entered into no contract to repay this money, although it offers to repay it in its bill. It could have invested the money if it saw fit in stock of the Middlesex Railroad Company, unless the statutes prohibited such an investment. It was to the extent of $25,000 in effect a payment on account, and although it is not inconsistent with a claim for the value of the stock if it exceeded $25,000, it is in a sense inconsistent with a specific allotment of stock to the plaintiff. If the plaintiff intended to elect once for all to take stock rather than money, it should at once have brought its bill against the Middlesex Railroad Company and the International Trust Company, and attempted to compel a transfer to itself of some of the stock which by statute had been appropriated to the redemption of its bonds. Having neglected to do this, and having received money on account, which it has retained, equity does not require that it should be paid more than the market value of the stock at the time it demanded it. To permit the plaintiff to receive all the advantages which have subsequently happened to accrue from the ownership of stock, while at the same time it has had the use of the money, would be to permit it to speculate upon the advantages of taking either money or stock according to the event.

The defendants cannot resist payment on the ground that the plaintiff was not authorized to invest its money in the stock of the Middlesex Railroad Company, if this be true, upon which we express no opinion. Pub. Sts. c. 119, § 55. *National Bank* v. *Whitney*, 103 U. S. 99.

By the terms of the report, an assessor is to be appointed to determine the value of 250 shares of the stock of the Middlesex Railroad Company on January 31, 1885, and the plaintiff is entitled to a decree for the amount of this value over $25,000, with interest from that day. *So ordered.*

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CATHERINE ALLERTON, administratrix, *vs.* BOSTON AND MAINE RAILROAD.

Suffolk. January 12, 1888. — March 2, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Railroad — Passenger — Loss of Life — Due Care — Statute — Declaration.

If a passenger on a railroad car alights at his destination, and, after the train has passed on, starts away from the station over an adjacent crossing of a highway at grade to go to some other place, he ceases to be a passenger.

A woman alighted from a railroad train upon a station platform near the crossing of a highway at grade, where the gates were down, and, as soon as the train had passed, without waiting for the gates to be raised and without looking to see whether a train was approaching on the other track, hurried over the crossing and was killed. The crossing was covered with planks for the entire width of the railroad, platforms sloping down to the tracks stretched away from it on either side, and there was nothing to prevent passing from the platforms to the crossing. *Held*, that there was no evidence that she was in the exercise of due care.

An action is not maintainable against a railroad under the Pub. Sts. c. 112, § 213, for the loss of life of one not in the exercise of due care, if the declaration is framed on § 212, and merely avers that the deceased while a passenger, or while not a passenger in the exercise of due care, was killed by the negligence of the defendant, its servants or agents.

TORT by the administratrix of the estate of Sarah M. Lawrence, for causing her death. Writ dated April 28, 1886. The declaration contained two counts. The first count was as follows: "The plaintiff says the defendants are a corporation owning and operating a railroad between Boston and Portland, and a common carrier of passengers; that the plaintiff's intestate, on the sixth day of March last, at Malden, which is a station on said railroad, was a passenger on said railroad; that while such passenger, and in the exercise of the rights of a passenger, she was killed, by reason of the negligence and carelessness of the defendant corporation, and the gross negligence and carelessness of its agents and servants engaged then in its business in the management and running of its trains into and through the station at said Malden, and the plaintiff further says that the defendant is liable to her in damages to the amount of five thousand dollars for the death of said intestate, so caused."

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The second count alleged that the intestate at the same time and place "was in the exercise of due care, and was not a passenger nor in the employment of the defendant; that while in the exercise of such care she was killed, by reason of the negligence and carelessness of the defendant corporation, and the gross negligence and carelessness of its agents and servants engaged then in its business, in the management and running of its trains." The declaration was amended so as to allege the following specific acts of negligence: 1. The making of improper, unsafe rules, regulations, and time-tables, for the running and management of its trains. 2. The establishment and maintenance of dangerous crossings, platforms, gates, and station accommodations. 3. The neglect to ring the bell or sound the whistle at the crossing. 4. The gross negligence and carelessness of its agents and servants. Answer, a general denial.

At the trial in the Superior Court, before *Bacon* J., there was evidence tending to show the following facts:

The plaintiff was duly appointed administratrix of the estate of Sarah M. Lawrence. The intestate was a passenger from Wyoming to Malden on one of the defendant's inward trains, and alighting at Malden, either on the platform near the Pleasant Street crossing, or on the crossing, was killed at a place about the middle of the crossing by an outward train.

The railroad at the place of the accident consists of two tracks, and runs about north and south, outward trains using the easterly track. The width of each track is about four feet eight and one half inches between the rails, the distance between the tracks is a little less than six feet, and the distance between the platforms a little less than twenty-three feet. Pleasant Street, which crosses the railroad at the station at grade, is about sixty feet wide, and is planked between the tracks the full width of the street. There are platforms on both sides of the tracks on each side of the street, the platforms south of the crossing being each about two hundred feet long, and north of the crossing being each about two hundred and fifty feet long. There are gates at the crossing consisting of a single bar, on a line with the outside of the platforms on the westerly side of the tracks, and at a similar distance on the easterly side, which when lowered close the highway. There are no gates at the ends of the

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platforms, nor barriers to prevent passengers from walking off upon the crossing. The platform where the intestate left the train is on the western side of the tracks, is about eleven feet wide, and slants gradually down to the crossing. A horse-car track crosses the railroad tracks through the centre of Pleasant Street, at right angles with the tracks. There is a house for the gateman on the eastern side of the track at the crossing, on the south side of Pleasant Street, just off the line of the street. There is an apothecary store on the south side of Pleasant Street, on the easterly side of the railroad, next to the gateman's house. An express train left Boston at five o'clock, and the train that killed the intestate left Boston one minute later, and made no stops at regular stations before it reached Malden.

John F. McGrath testified, that the express train passed the place of the accident first, and then he saw the inward train coming down; that he was on the easterly side of the track, and did not see the intestate till that train had gone; that then she was between the two tracks, just a little north of the horse-car tracks, going in an easterly direction; that he thought that then the cow-catcher of the outward train from Boston was twenty or thirty feet south of the horse-car track, and probably half a car's length south of the gateman's house; and that when he saw her struck, she had just got both feet on the outward track. On cross-examination he said that she had begun to go across the street; that he heard somebody call out to her, and say, "Go back, lady"; that she could have gone back if she had heard it; that he could have done so; that he thought she had one foot on the track when they shouted to her; that even then she could have stepped back; that he did not see her look towards the train that was coming; that she was going ahead, and was paying no attention to anything that was going on; and that she was hurrying across the track, and not paying much attention to anything but getting across.

Annie Muldoon testified that she and Mrs. Lawrence took the train for Malden, at Wyoming, and sat within two seats of each other; that both got off at Malden, on the north side of Pleasant Street, near the end of the western platform, and walked along the platform and stood at the end of it; and that, as soon as the end of the train passed, Mrs. Lawrence started to cross over towards the apothecary store.

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Nelson Jameson testified, that he had known the intestate by sight; that when she was killed he was standing with his team on the western side of the track five or six feet from the gate, waiting to cross; that he saw the train for Boston come in, and saw the gates put down; that he saw her get off on the side and walk down the planks. "I should judge she got out of the second or third car; saw her attempt to cross the track in a hurry, after the train passed by in which she came. Just as quick as the train went by, she scooted across quick; did not see the train from Boston till it struck her; was on the opposite side of the train from Boston, and the train to Boston was between me and this train. When Mrs. Lawrence attempted to cross, she was in front of me, a little on my right-hand side. The gates were down till she was killed. When I first saw her, she was walking off the end of the platform down upon the street. She crossed the street diagonally, a little towards the right. Did not see the train from Boston at all, until it struck her. She walked down upon the street inside the gates, on the railroad side. There was no bell rung or whistle blown by the train from Boston. Don't remember, it was so long ago, whether I saw Mrs. Lawrence look towards the train from Boston. She could not see this train, because the other cars were between her and it, but after she got over the track, on which the train was going into Boston, then she could have seen it, by turning and looking, — by just slewing her head."

Emma E. Bradbury testified, that she "saw the train for Boston come into the station; don't remember any other train before it; saw Mrs. Lawrence get off on the western platform, and walk towards the lower end of the platform. She stood there till the train passed, and just after the train passed, she stepped right behind the last car on to the track, and walked diagonally across Pleasant Street towards the gate-house; she went inside the gate. As soon as the train had left Malden to go to Boston, she stepped right behind the last car; she stepped quick; saw Mrs. Lawrence from the time she got off till she was killed. I don't know that I saw the outgoing train from Boston, till it struck her. I was n't looking that way. From the place where I was, I could have seen the train from Boston when it got to the gate-house. From the place where Mrs. Lawrence stood, when she

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started to go across, she could not have seen the train from Boston, because her train was between her and that. Don't remember whether she looked up or down the track before crossing; she might have turned her head one way or the other. Noticed she was in a hurry to cross the track, that was all. She continued to hurry till she was struck."

Samuel W. Ferbish testified that he was a hack-driver, and was standing on the eastern side of the track, probably twenty-five feet from the Pleasant Street gate, waiting for both trains to come in; that he saw the express from Boston go through first, and then the train to Boston come in; that he first saw the intestate just after the hind end of the train for Boston went by; that she was coming towards where he stood; that he saw her struck; and that, if she had looked, she could have seen the engine that was coming, but she did not look.

Albert W. Alger testified that he was the engineer of the train that left Boston at one minute past five o'clock; that he got to Malden at seventeen minutes past five o'clock; that he did not see the intestate, and did not know that his engine struck anybody till the fireman told him. On cross-examination he testified that he shut off steam very soon after he came around the gas-house curve; that the train for Boston was then in the Malden station, and was getting under way; that he passed the rear car about at the end of the southern platform; that at that time he was going as fast perhaps as from five to seven miles an hour; that the bell was rung, and that he reversed his engine when told by the fireman that something was happening, or likely to happen; that he was using the atmospheric brake when he passed the rear end of the other train, in order to make his stop at the station; and that he did not whistle when a crossing is at a station where he was going to make a stop.

Michael M. Moynahan testified that he was a hack-driver, and stood on the eastern platform, near the crossing; that just as soon as the inward train started off, the intestate started to go diagonally across Pleasant Street; that she was walking quite fast; that he kept his eye on her till she was killed, but did not see her look towards the engine at all; and that she was going quite fast, was looking in the direction in which she was going, and did not pay attention to anything else.

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Upon this evidence the judge ruled, at the request of the defendant, that the action could not be maintained, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions.

C. G. Fall, for the plaintiff.

S. Lincoln & W. I. Badger, for the defendant.

KNOWLTON, J. The plaintiff's intestate had ceased to be a passenger before the accident which caused her death. She had reached her destination, had alighted from the train, had taken a position upon the sidewalk of the highway, and thence had started to cross the track along the street, not upon her way to the defendant's station, but to some other place which she had in mind.

Was there any evidence at the trial that she was in the exercise of due care? It is well established law, in this Commonwealth and elsewhere, that one who starts to cross a railroad track without looking for approaching trains, unless he has a good reason for not looking, is not in the exercise of proper care. And this rule has been repeatedly applied to persons crossing a double-track railroad, who have started immediately after the passage of one train without looking for the approach of another. *Warren* v. *Fitchburg Railroad*, 8 Allen, 227. *Bancroft* v. *Boston & Worcester Railroad*, 97 Mass. 275. *Mayo* v. *Boston & Maine Railroad*, 104 Mass. 137, 141. *Wheelwright* v. *Boston & Albany Railroad*, 135 Mass. 225.

There is nothing in the case at bar to relieve the plaintiff from the operation of this rule. The gates upon the highway were down, as a warning that the tracks were in use, and that it was not safe to cross. As soon as the train from which the plaintiff's intestate had alighted passed on, she started to cross, without waiting for the gates to be raised, and without looking to see whether a train was approaching upon the other track. The evidence shows that, if she had looked after the first train passed, she could not have failed to see that by which she was afterwards struck. The latter train, when it met the former one from which she alighted, was going at the rate of five to seven miles an hour, with its atmospheric brake on, about to make the stop at the station. She must have known that this was a double-track railroad, upon which trains running in each direc-

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tion were always to be expected. There was no express or implied invitation to her to cross, nor any excuse for her crossing without looking for a coming train. There was no evidence in the case to warrant a finding that she was in the exercise of due care.

The declaration contains two counts, the first alleging that the plaintiff's intestate was a passenger, and claiming under that part of c. 112, § 212 of the Public Statutes which makes a railroad corporation liable when the life of a passenger is lost through its negligence, or the gross negligence of its servants or agents, and the second claiming under that part of the same section which creates a liability when the life of a person in the exercise of due diligence and not a passenger is lost by reason of such negligence. This last count contains all the allegations appropriate to a claim under this branch of the statute, and no others.

Section 213 of the same chapter creates a liability in a particular class of cases, where a person is injured by collision with the engines or cars of a railroad corporation at a crossing of a highway or town way at grade, and it appears that the corporation neglected to ring the bell or blow the whistle as required by law, and such neglect contributed to the injury. In such cases, the person injured may recover, unless it appears that he was at the time guilty of gross or wilful negligence, or was acting in violation of law, and that such negligence or unlawful act contributed to the injury.

The declaration does not contain the allegations necessary to bring the case within this section. It is nowhere alleged in it that the accident occurred at a crossing of a highway or town way, or that the injury was by collision with an engine or car of the defendant. On the contrary, both counts follow in their averments the precise language of those parts of § 212 under which they were respectively brought. Under the last count there are certain specifications of negligence, which do not change the character of the count, nor contain the allegations material to a claim under § 213. The suit must therefore be deemed to have been brought under § 212, and the plaintiff cannot hold the defendant to answer under the provisions of § 213. *Wright* v. *Boston & Maine Railroad*, 129 Mass. 440.

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The Superior Court has ample power to allow amendments in all cases pending therein, and if the plaintiff at the trial thought her action maintainable under that section of the statute, and desired to avail herself of its provisions, she should have applied for leave to amend her declaration. In the opinion of a majority of the court, the entry must be

Exceptions overruled.

ELLEN C. RICE *vs.* NEW ENGLAND MUTUAL AID SOCIETY.

Suffolk. January 12, 13, 1888. — March 2, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Beneficiary Association — Assessments — Payment — Forfeiture — Waiver.

The levy and acceptance of assessments by a beneficiary association without condition, after the conditional acceptance of a prior overdue payment, is a waiver of the right to avoid a certificate for delay of payment.

CONTRACT to recover $5,000 on a certificate of membership in the defendant society issued to Thomas G. Rice, the husband of the plaintiff. The plaintiff, who was the beneficiary named in the certificate, died after the action was brought, and her administrator was admitted to prosecute it.

At the trial in the Superior Court, before *Bacon*, J., there was evidence tending to show the following facts:

Rice died on December 17, 1885, and notice and proofs of his death were duly furnished to the defendant. The certificate contained the clause, that if the member should "omit or neglect to pay to said society within thirty days of date of notice the annual fee of five dollars, the advance assessment, or any regular assessment of six and one half dollars, that may be made by said society upon him under this certificate, then in every or either event above named this certificate shall thereby become null and void." The application upon which the certificate was issued contained an agreement that "a printed notice, expiring thirty days from date, and mailed within one day of

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the date thereof, shall be sufficient notice of any assessment levied." The residence of Rice was stated in the certificate to be Cambridge, but he resided in Cambridgeport, and that was his post-office address. On or before July 17, 1885, a regular assessment was made by the society upon the class in which Rice held his certificate, and notices thereof were deposited in the post-office at Boston on July 18, 1885, between two and four o'clock P. M. There was no evidence that among these notices was included one to Rice, but one was found in his pocket on August 19, 1885, after he became ill. If a notice to Rice was among those so mailed, it would in due course of mail have arrived at Cambridge on July 19, and, as that was Sunday, would not have reached the Cambridgeport post-office until July 20, at about nine o'clock A. M.

On August 19, 1885, Rice was not in good health, and from that time never returned to business. His death took place in December, of Bright's disease. When the notice of assessment dated July 17, 1885, was found in the pocket of Rice, it was sent with $6.50 by a messenger, to the office of the defendant. The defendant's cashier received the money without inquiry or objection, stamped on the notice the words, "This assessment is accepted on condition that the member is in good health," and, having receipted for the sum on the notice, gave it back to the messenger. Nothing was said to or by the messenger relative to the health of Rice, nor did the messenger know anything about it. Afterwards, and before the death of Rice, six other assessments were made by the defendant upon him under the certificate, and were paid by the plaintiff, at Rice's request, to the defendant, within thirty days of the dates thereof. These assessments were received unconditionally by the defendant, and when paid the defendant made no inquiry concerning the health of Rice, and no information was furnished to the defendant concerning it. There was no evidence that the defendant had any knowledge that Rice was not in good health when the payment of August 19, 1885, and the subsequent payments of assessments were made, until after his death.

The judge, at the request of the defendant, instructed the jury, that, under the provisions of the certificate, if the assessment mentioned in the notice dated July 17, 1885, was not

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paid within thirty days of the time when it reached the post-office of the residence of Rice, in due course of mail, then the certificate became null and void; and that, under the provisions of the application and certificate, if the notice of assessment dated July 17, 1885, was mailed within one day of its date, and the assessment was not paid within thirty days of July 17, 1885, the certificate would become null and void, unless it was ratified by a subsequent payment made, and unless the fact of a failure to make this payment within the time was waived. The judge also ruled and instructed the jury, against the objection of the defendant, in substance, that the defendant, having received the six assessments made after the payment of the one paid conditionally on August 19, 1885, without making any inquiry to ascertain the facts concerning the health of Rice, waived the breach of the certificate, if there was any at the time of the payment on August 19, 1885; that if the jury found that the defendant did receive, without inquiry, assessments subsequent to that received on August 19, 1885, and that they were paid by the plaintiff, that would amount to a waiver of any default or nonpayment at that date, August 19, 1885; that if the jury were satisfied that without inquiry the defendant did receive such subsequent payments, it would amount to a waiver of a default at that time; and that it would make no difference that the six subsequent assessments were paid before they were due.

The jury found for the plaintiff; and the defendant alleged exceptions.

F. D. Ely, for the defendant. Upon the facts, the receipt by the defendant of the subsequent assessments was not a waiver of the breach of the certificate. *Hoxie* v. *Home Ins. Co.* 32 Conn. 21. *Insurance Co.* v. *Wolff*, 95 U. S. 326. *Mobile Ins. Co.* v. *Pruett*, 74 Ala. 487. *Servoss* v. *Western Aid Society*, 67 Iowa, 86. The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. *Insurance Co.* v. *Wolff*, *ubi supra*.

If the law recognizes a doctrine of waiver by conduct distinguished from that of estoppel *in pais*, the essential elements of such waiver are knowledge of the right claimed to be waived,

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and intention to waive it, and these must be concurrent. *West* v. *Platt*, 127 Mass. 367. *Oakes* v. *Manufacturers' Ins. Co.* 135 Mass. 248. *Holdsworth* v. *Tucker*, 143 Mass. 369.

The six subsequent payments and receipts relate back to the condition of the receipts of August 19, 1885, and are as much controlled and affected by it as though the words of that condition were stamped on each subsequent receipt. The acceptance and retention of the receipt of August 19, 1885, was an affirmation and representation that the insured was then in good health. The insured intended that the defendant should act on that representation, and it did act upon it. The plaintiff is therefore estopped from taking advantage of such acts of the defendant to its prejudice. *Dewey* v. *Field*, 4 Met. 381. *Osgood* v. *Nichols*, 5 Gray, 420. *Cartwright* v. *Bate*, 1 Allen, 514. *Audenried* v. *Betteley*, 5 Allen, 382.

C. P. Sampson, (*S. J. Thomas* with him,) for the plaintiff.

C. ALLEN, J. If it be assumed that the payment made on August 19, 1885, was too late, the question remains whether the company by its subsequent acts waived a right to avoid the policy or certificate of insurance on that ground.

Without expressing any opinion as to the effect of the retention of that money, we think the levy of the subsequent assessments, and the acceptance of the money paid upon them, amounted to such a waiver. When the time came for the levy of a new assessment, if Rice's policy was to be treated as still in force, he would properly be included in the assessment; otherwise not. Under this state of things, six other assessments upon him were made by the company, all of which were seasonably paid. There was no determination by the directors of the company, that for the time being Rice's policy should be treated as not in force or suspended; but in making the new assessments, so far as appears, no pains were taken and no intention was formed to exclude him. No condition was in express terms annexed to the levy of these new assessments, or to the acceptance of the payments by the assured upon them. The company, however, contends that the condition of the former acceptance reaches forward, and applies also to the later payments, and that it is not bound by later assessments which it made, and later payments which it received, in ignorance that the assured was

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in ill health at the time of the former payment. But it cannot be allowed in this way to imply a condition in favor of a forfeiture. It had knowledge that on the former occasion the payment had been made too late, and that the money had been accepted with a condition annexed. If, before levying a new assessment, the company wished to know the particulars as to Rice's health, and thus to determine whether that payment was valid or not, it was incumbent on it to make inquiry. Instead of doing so, instead of notifying him that it wished for some positive evidence or statement upon the subject, instead of imposing a further condition relating back to the time of the former payment, the company made an unconditional call upon him for the payment of a new assessment. It acted under no deception or misrepresentation, but it had all the information which it cared to take the pains to acquire. We are unable to see how it can properly be held that the former conditional acceptance cuts down the effect of the later unconditional acceptance. The condition relates to the former payment alone. Suppose the payment of the former assessment had never been made at all, and the company, without insisting upon the nonpayment as a ground of forfeiture, had levied new assessments upon the assured, which were all duly paid and accepted without condition; could it be contended that there was no waiver? An unconditional acceptance upon assessment waives all former known grounds of forfeiture, and this effect is not varied or limited because an acceptance of a former assessment had been on condition, and had not amounted to such a waiver. *Hodsdon* v. *Guardian Ins. Co.* 97 Mass. 144. *Bouton* v. *American Ins. Co.* 25 Conn. 542. *Phœnix Ins. Co.* v. *Raddin*, 120 U. S. 183. *Exceptions overruled.*

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HENRY HUNT *vs.* WILLIAM BROWN, administrator.

Suffolk. January 13, 1888. — March 2, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Contract — Consideration — Evidence — Pleading.

The payee of a note promised that, if the maker would assent to a compromise of a claim that would lessen such maker's share in an estate, he would accept the percentage taken to settle the claim in full settlement of what was due on the note. The assent was given, the compromise was made, proving beneficial to the estate, and full recovery was had on the note, the maker pleading a general denial and payment only. *Held*, in an action for breach of the agreement, that there was evidence of consideration, that it was not a release or satisfaction, but collateral, and that the judgment on the note was no bar.

HOLMES, J. The plaintiff made three notes to Russell, the defendant's intestate. Afterwards, according to the plaintiff's evidence in the present case, Russell promised that, if the plaintiff would assent to a compromise, by the executors of the plaintiff's father's will, of a claim in their hands against third persons, by which compromise the plaintiff's share of his father's estate would be diminished, Russell would accept in full settlement of the balance due upon the notes whatever percentage the executors should take in settlement of their claim. The executors then settled the claim for sixty-two per cent of the amount, with the plaintiff's assent. Then Russell died, and suit was brought by his administrator, the present defendant, upon the notes, against the present plaintiff. The latter pleaded a general denial and payment, and afterwards made an offer of judgment for the full amount of the notes, interest, and costs, which was accepted, and the sum was paid. The present suit is upon Russell's alleged agreement. The defendant asked a ruling that the agreement was without consideration, and also that the judgment in the former case was a bar. Both rulings were refused, and he excepts.

1. It is very plain that the jury were warranted in finding that the plaintiff's assent to the compromise was dealt with by the parties as a consideration, that is, as the conventional inducement of Russell's promise, and not merely as a condition precedent, and that if it was so dealt with it was sufficient. Evidence or

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even an admission that the compromise was for the plaintiff's advantage would not alter the case. In determining whether or not an act was dealt with by the parties to an oral agreement as a consideration, the fact that its consequences were seen to be advantageous to the actor may be important; but on the question of sufficiency alone, it is enough that the immediate effect of the act is an abandonment of an actual or supposed right, whatever the balance of advantages may be in the long run. It is hard to imagine any change of position, not made in pursuance of a previous duty, which may not be sufficient as a consideration, or which is not a detriment in a legal sense.

2. If Russell had received the sixty-two per cent as agreed, and the suit had been brought for the residue, the question would arise whether the acceptance of less than the sum due, upon a collateral consideration, could be distinguished from an acceptance of less, before the notes fell due, or, like that, constituted an accord and satisfaction; *Bowker* v. *Childs*, 3 Allen, 434, 436; and if it was technically a satisfaction, whether, like a payment, (*Fuller* v. *Shattuck*, 13 Gray, 70,) it must not have been pleaded in the suit upon the notes if it was to be relied on at all, or whether there remained any contract unexecuted by the party satisfied which he would break if he afterwards brought suit. But Russell did not accept the sixty-two per cent; so that the only question is whether his agreement in any other way extinguished the notes in whole or in part, since in that case the judgment might be a bar.

The agreement was not itself a satisfaction. It was not a new contract substituted for the notes, and entitling the plaintiff to demand their surrender. Neither could it operate as a release of thirty-eight per cent of the notes, when the percentage was fixed by the compromise referred to. Language sometimes has been used which suggests that an agreement for a sufficient consideration might take effect by way of release, although not under seal. *Goodnow* v. *Smith*, 18 Pick. 414, 416. *Petty* v. *Allen*, 134 Mass. 265, 267. *Taylor* v. *Manners*, L. R. 1 Ch. 48. But the common law knows no such release. *Shaw* v. *Pratt*, 22 Pick. 305, 308. The consideration of the notes being executed, the agreement could operate only by way of accord and satisfaction. See *Cumber* v. *Wane*, 1 Smith's Lead.

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Cas. (8th Am. ed.) 633 and notes. *Bragg* v. *Danielson*, 141 Mass. 195, 196. *May* v. *King*, 12 Mod. 537, 538. The suggestion which we are considering, if stated in technical form, would have to be that Russell accepted the plaintiff's assent to the compromise which he desired, in satisfaction of thirty-eight per cent of the notes. But this is plainly a distortion of the evidence, according to which the assent was accepted, not as partial satisfaction of a debt, but as the consideration for a promise.

If, however, the jury might have been warranted in finding that the agreement, and what was done under it, had released or satisfied thirty-eight per cent, they were warranted at least equally in finding that it was purely executory in purport as well as in form, viz. to accept a percentage in satisfaction when it was paid. The court could not rule, as matter of law, that the opposite construction was the true one, or assume the opposite construction as a foundation for its rulings.

But it may be said, that the contract must have been found to embrace the element that Russell would not sue for more than sixty-two per cent. And it may be argued, that, if not technically a release, it ought to have been available in defence *pro tanto*, by way of estoppel or otherwise, in order to avoid circuity of action, upon the same principle that a covenant not to sue is allowed to enure as a release. The answer is, that whether available in this way or not, whether or not such a defence would escape the objection that in substance it was accord without satisfaction, the plaintiff was not bound to use the agreement in defence. For if, as we have tried to show, and as the suggestion under consideration assumes, Russell's agreement did not extinguish the whole or any part of the notes, but left them in full force, it also necessarily retained its independent character as a collateral contract. See further *Costello* v. *Cady*, 102 Mass. 140. *Blake* v. *Blake*, 110 Mass. 202. A breach of it was a substantive cause of action, upon which the present plaintiff might bring his own suit in his own way, and he was no more bound to plead it than he would have been bound to plead a set-off, fraud, or a breach of warranty. *Smith* v. *Palmer*, 6 Cush. 513, 521. *Cobb* v. *Curtiss*, 8 Johns. 470. See *Burnett* v. *Smith*, 4 Gray, 50, 52; *Davis* v. *Hedges*, L. R. 6 Q. B. 687.

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When a defendant has the choice of setting up a matter in defence, or of suing upon it in another action, if he chooses not to set it up in defence, of course the judgment in the action against him is no bar to a subsequent suit by him. *Smith* v. *Palmer*, *ubi supra*. *Star Glass Co.* v. *Morey*, 108 Mass. 570, 573. *Davis* v. *Hedges*, *ubi supra*. Russell's agreement was not pleaded in the former action. Even if it had been executed, it would not have been admissible under a plea of payment. *Ulsch* v. *Muller*, 143 Mass. 379. *Grinnell* v. *Spink*, 128 Mass. 25. The present plaintiff, not having set up the agreement, and having no other defence, very properly saved himself costs and his antagonist delay by submitting at once to the inevitable and offering judgment. See *Rigge* v. *Burbidge*, 15 M. & W. 598.

Exceptions overruled.

N. W. Ladd, for the defendant.

H. N. Sheldon, for the plaintiff.

JOHN N. ROBERTS *vs.* FRANCIS L. WHITE.

Suffolk. January 16, 1888. — March 2, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Chattel Mortgage — Replevin — Tender — Equitable Defence.

A tender to a mortgagee who has replevied goods to which he was entitled, if effective at all, must be followed by bringing the money into court and plea thereof.

In an action of replevin, an equitable defence that would not afford absolute relief, even if the facts relied on had not occurred since the writ was served, will not avail the defendant.

REPLEVIN of household furniture. Writ dated June 4, 1877. An amended answer filed by the defendant on October 24, 1884, to avail himself of the St. of 1883, c. 223, § 14,* alleged that he

* This statute, which conferred upon the Superior Court original and concurrent jurisdiction in equity with the Supreme Judicial Court, provides in this section: "In actions at law in the said courts, the defendant shall be entitled to allege as a defence any facts that would entitle him in equity to be absolutely and unconditionally relieved against the plaintiff's claim or

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was the assignee of a second mortgage of the replevied goods; that he took possession of the goods for breach of condition; that the first mortgage was given to one Ridgeway; that the plaintiff, on May 23, 1877, became the assignee of the first mortgage, and that on or about June 14, 1877, the defendant made a "tender of the full amount of money, with all costs and interest due on the said Ridgeway mortgage, but the said plaintiff wholly refused to receive the same; that since the removal of said property by said plaintiff, under his replevin writ, he has had the said property in constant use, deriving therefrom a large sum of money, and that by reason of the use to which the same has been put, the value thereof has greatly depreciated, so that a return of the same to this defendant would entail great loss upon him; that this defendant is now and ever has been ready, able, and willing to pay to the said plaintiff the amount due upon said Ridgeway mortgage, the interest thereon, and any costs prior to the tender and offers hereinbefore set forth. And further answering, this defendant says, that the plaintiff, in equity and good conscience, is bound to account to the defendant in this court, in this action, for any and all sums received by him for the use of said property, for any and all depreciation in the value of the property which has occurred since he took possession of the same; that the sums thus received, and the amount of depreciation, together with the damages for the taking and detention of the property in this suit, should be deducted from any sum due under his said mortgage, as principal, interest, and costs; and this defendant should be required to pay to said plaintiff, on return of said property, only such balance, if any, as may be found due after such deduction; and this defendant says that at the time of commencement of this replevin suit he was entitled to the possession of the said replevied property, and that the plaintiff then had no right, title, or interest in said property as against this defendant."

At the trial in the Superior Court, before *Aldrich*, J., it appeared that the plaintiff was the assignee of a mortgage of the

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cause of action, or against a judgment obtained by the plaintiff in such action; and the plaintiff shall be entitled to avail himself, in answer to any defence alleged by the defendant, of any facts that would avoid such defence in equity, or would entitle the plaintiff to be absolutely and unconditionally relieved in equity against such defence."

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goods, dated March 5, 1877, and given to Edward Ridgeway to secure the payment of a note for $1,200, payable in one month, and by him assigned to the plaintiff on May 26, 1877, and that the defendant was the assignee of a second mortgage of the goods, of which he had taken possession for breach of condition of that mortgage, and retained possession till the writ was served. The defendant being prepared to offer evidence upon all the matters set up in the amended answer, the judge ruled that the defendant could not avail himself of the equitable defence set up therein, but did allow the defendant to introduce evidence in support of his plea or answer of tender therein set forth. The defendant introduced evidence of a tender, made after the service of the writ, by the defendant to the plaintiff, of the amount due on his mortgage, with interest and costs; but the judge ruled that the tender was invalid, because it was not followed up by bringing the money into court for the plaintiff's use, and because the answer contained no allegation that he brought the money into court for the plaintiff.

The judge directed a verdict for the plaintiff; and the defendant alleged exceptions.

E. Avery & G. M. Hobbs, for the defendant.

J. B. Richardson, for the plaintiff.

MORTON, C. J. It appears that the plaintiff, who is the assignee of a first mortgage of the goods replevied, had, at the time he sued out his writ, a right to the immediate and exclusive possession of the goods. This entitles him to maintain this action, the object of which is to give him in fact the possession to which he is entitled in law. It is difficult to see how any tender after suit brought can avail the defendant; but if it can under any circumstances, it must be a tender followed up by bringing the money into court for the plaintiff's use. *Storer* v. *McGaw*, 11 Allen, 527. *Brickett* v. *Wallace*, 98 Mass. 528. No such tender was pleaded or proved, and the ruling of the Superior Court on this subject was sufficiently favorable to the defendant.

The court correctly ruled that the defendant could not avail himself of the equitable defence set up in his amended answer. This defence in substance is, that all sums received by the plaintiff for the use of the property replevied, and the amount of any depreciation in the value of the property since he took possession,

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together with the damages for the taking and detention in this suit, should be deducted from the amount due on his mortgage, and this defendant should be required to pay only the balance, if any, to the plaintiff on return of said property.

The answer does not allege that these items, if allowable, will fully pay and discharge the plaintiff's mortgage, and therefore does not set up facts which would entitle the defendant "to be absolutely and unconditionally relieved against the plaintiff's claim or cause of action." St. 1883, c. 223, § 14. But, further, all the facts set up have occurred since this action was commenced, and they have no tendency to prove that at the time of the caption he had not the right to the possession of the goods.

The defendant has mistaken his remedy, which plainly was to bring a bill to redeem after the plaintiff gained possession of the goods, in which action he could avail himself of the equities, if any, in his favor. *Exceptions overruled.*

RUFUS H. BRIGHAM, executor, *vs.* WILLIAM P. HOLDEN & another.

Middlesex. January 16, 1888. — March 2, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Promissory Note — Consideration — Evidence.

If an agent of a mortgagor buys his equity at a sheriff's sale, and gives a note for the mortgage, which had been paid, evidence that he afterwards conveyed the land to the mortgagor for enough to cover the purchase money and the note is inadmissible to show a consideration for the note.

CONTRACT upon a promissory note payable to the order of the plaintiff's testator, and signed by the defendants. Answer, want and failure of consideration. At the trial in the Superior Court, before *Knowlton*, J., the jury returned a verdict for the defendants, and the plaintiff alleged exceptions, which, so far as material, appear in the opinion.

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G. A. King, for the plaintiff.

W. B. Gale & J. W. McDonald, (*J. P. Gale* with them,) for the defendants.

MORTON, C. J. Abraham Tyler, being the owner of a lot of land, mortgaged it to Francis Brigham, the plaintiff's testator. The equity was afterwards seized on an execution against Tyler, and the defendants became the purchasers at a sheriff's sale. While they owned the equity, Brigham presented his mortgage note and represented that it was due and unpaid. Thereupon the defendants took an assignment of the mortgage and gave the note in suit. It is now admitted that nothing was due on the mortgage. This being so, it was the duty of Brigham to assign or discharge the mortgage, and therefore there was no consideration for the note in suit. To meet this defence, the plaintiff offered to prove that more than a year after the giving of the note in suit the defendants sold to Tyler the land in question, and received from him, in money and a note for five hundred dollars secured by a mortgage upon the land, all that they paid at the sheriff's sale, and all that they agreed to pay Brigham by the note in suit.

The court rightly rejected this evidence. When the conveyance was made to Tyler, the defendants had a legal fee simple. If we assume that Tyler agreed to pay to them enough to indemnify them for what they had paid for the equity and for the Brigham mortgage, it is difficult to see how the plaintiff can derive any advantage from it. It does not supply a consideration for his note, nor furnish any reason why the estate of Francis Brigham should recover a sum of money to which it has no legal or equitable right. It might furnish to Tyler an equitable, or perhaps legal, defence against his mortgage note given to the defendants.

But it appears in the record of the case of *Tyler* v. *Brigham*, reported 143 Mass. 410, which record is a part of the evidence in the case at bar, that in the purchase of the equity and of the mortgage the defendants were acting as the trustees or agents for Tyler. This being so, it is clear that the defendants have no claim against Tyler on their mortgage, (unless there are other undisclosed equities between them,) if he is not required to pay the note in suit. They receive no advantage from the assign-

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ment of the mortgage to them by Francis Brigham. Tyler, who has once paid the Brigham mortgage, gets the benefit of such payment, and thus the real equities of all parties are worked out in this suit.

The other exception taken by the plaintiff is not pressed, and we assume that it is waived. *Exceptions overruled.*

JOHN M. GOODNOW *vs.* WALPOLE EMERY MILLS.

Suffolk. January 18, 1888. — March 2, 1888.

Present: MORTON, C. J., DEVENS, HOLMES, & KNOWLTON, JJ.

Master and Servant — Negligence — Personal Injuries.

A machinist and engineer, who undertakes extra work for extra pay, first examining the place and receiving particular directions, within three feet of a rapidly revolving shaft, which he knew was in operation, and is caught by a set screw projecting from a collar on the shaft next a journal which he had once before oiled, the screw being of a kind in common use, with the nature and use of which he was familiar, cannot recover from his employer for an injury so received.

TORT for personal injuries occasioned to the plaintiff while in the defendant's employ. At the trial in the Superior Court, before *Aldrich*, J., there was evidence tending to prove the following facts:

The plaintiff was employed in July, 1881, to take charge of and run the engine and pumps in the defendant's mill by one Way, its superintendent. The plaintiff was injured on October 20, 1881, by being caught upon a set screw projecting about one inch from the collar of a two and a half inch smooth shaft, the collar being three inches broad and fixed on a shaft contiguous to the box or journal holding the end of the shaft, and the set screw being in the middle of the collar. The set screw had a square head with four sharp corners, and was within about two inches of the box or journal, which was hung vertically, the box being sixteen inches long, six inches wide, and six inches deep. The collar and set screw were about three feet from the stamp which the plaintiff was repairing when injured.

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The plaintiff testified in substance as follows: I am thirty-seven years old. On the night of October 19, 1881, I had been running the engine from six o'clock P. M. till six A. M., and Mr. Way asked me if I would help fix the stamp under his direction. I said I would. He told me what he wanted done, and how he wanted it done; that he wished to take out the lining and put in a new one. I had never done it before, and knew nothing about how it was to be done, except as I was told by Mr. Way. He told me this the morning of October 20. I left work at six o'clock A. M., went to breakfast, and returned about seven or a little after Found Mr. Way in the yard. He asked me if I was ready to go to work, and help put the linings in. He went in and showed me what he wanted done and what had got to be done. I was never in the place where I was put to work before, that I know of; there was nothing in my duty which called me there, and no occasion for me to be there at all in my work. I had put a cylinder head in the steam cylinder and adjusted the valve upstairs before that; can't tell how long before. In doing that I would go through the engine-room and stamp-room. On October 20, Scott and Morissey were there helping me put in the lining all the time; and Mr. Way was there part of the time. I was at work in the stamp-room, in front of the mortar here. Scott from above lowered the lining down, and it was partly in the mortar, and Morissey and I were pushing it in. I stepped down, put my shoulder underneath the corner to push the lining in, and I was caught. [The witness illustrated with a model the manner in which he did this.] At that time I did not know anything about any set screw being on the shaft; never had any intimation of any such thing. There was nothing in my duties which would require me to see it, or know it was there, or to call my attention to it; the next thing that I knew I was going round with the shaft. When I first felt the pull I hollered to Joyce to shut down the engine. The shaft was revolving about one hundred and seventy times a minute, as I estimated by the speed of the engine and the size of the wheels and pulleys. I had on my under-flannels and a pair of pants, a workingman's striped shirt, overalls, and a frock or jumper. The overalls and jumper were made out of blue drilling. The jumper came about to my waist. This is

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the dress I usually wore, — the dress that workingmen usually wear.

On cross-examination, he testified: Before I went to work for the defendant I had run the engine at the Union Straw Works for three seasons, commencing in the fall and shutting down in the spring. My duties as engineer at the Straw Works were to take care of the engine and the steam. I took the whole charge of the engine, kept it in ordinary repair, and oiled it. I had charge of the engine in the defendant's mill from the time I went there, and as engineer my duty was to keep it in ordinary repair, oil it, and make the steam. While there, and while in the employ of the Straw Works, I had learned that it was not expedient to go near machinery while in operation without using due care. I presume I could have stopped the shafting. I don't know whether I could have stopped the engine that morning while doing this work if I had wanted to do so. I was not asked whether it was not best to stop the engine. I knew that the shaft was revolving when I went to work there. I was standing within a very few feet of the revolving shaft; I knew the shaft was revolving because the engine was running. I don't know whether I looked out to see whether the shaft was revolving or not. I calculated to keep a safe distance from it. I think sixteen, eighteen, or twenty inches would be safe. Should not intend to get nearer than sixteen inches to it. I was led to go so near the shaft to get my shoulder under the lining. The side I was pressing to put in was the side farthest from me. My movement would depend upon whereabouts the lining was; it was suspended over the mortar down through the centre; the movement I was going to make was to throw it over to the side of the mortar farthest from the shaft, to put it in there. My tendency would be to keep a lining of two or three hundred pounds clear of all iron so it would not rub; my whole movement would not have been towards the shafting. In moving to put the lining into position, my movement would be away from the shafting; the farther the lining was pushed in, the farther from the shafting I would go. The lining was not in the mortar; one corner of it rested on the bar, and I was going to put it in. I never attempted to account for my being within two or three inches, or four inches, of the shafting while doing the work. I

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can't tell or recollect anything that required my getting within six inches of the shaft. I filled the oil cups on the hanger near the set screw once; it was not my business, and I can't say when I was in the engine-room; I smelt a hot box, and went from the engine-room and filled these oil cups. The shaft was revolving at the time, and I held my hand up near to the cups. It was in the daytime, I think; I can't tell how long before the accident. It was the business of Joyce, who ran the stamp overhead, to keep these cups filled. The oil cups were out of the engine-room. The collar in which was the set screw was next to the hanger; the object of it is to keep the shaft from working back and forth, so that, if there was another hanger beyond, you would have another collar to keep it steady; the collar is kept in place by the set screw. I had seen set screws in my life, and know what the object of set screws is; they are very common in machinery. There would be four or five on the engine; I could not tell how many on it. I could by stopping to think of the different parts. If I had stopped the engine, the accident would not have happened. I have no recollection when I filled the oil cups of how near my hand was to the shaft. The accident occurred about noon. I was working on extra time. I had worked whole time the night before. I agreed to come this morning, as extra work, and did come.

William A. Morissey testified for the plaintiff in substance as follows: I was in the employ of the defendant at the time the plaintiff was injured, as general workman. The stamp-room was eight or nine feet high; it is lighted by the door into the engine-room, and through the belt holes and the window. The window was about opposite the stamp. The window had three lights, I should think eight by ten, maybe a little larger, — a common window, the same as in underpinning of buildings; about half of the window was under ground. I was present when the injury was received. Goodnow and I stood in front of the mortar putting in the lining into the inside of it. The plaintiff said, "Hold on a minute, I want to get my shoulder under there," and turned facing me and got down to lift as I lifted on the inside corner to push the lining into the mortar, and I heard him cry out, and the next I saw him going over the shaft. In the progress of the work in the forenoon, we had occasion to use the lantern just

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inside the mortar, when we cleaned out the stone and took out the bolts of the old lining.

On cross-examination he testified: The platform on which the mortar stood was, I should think, two feet high above the floor, maybe more, so that, if a man was standing upon the platform, his foot would be about three feet below the main shaft. At the time of the accident, one or two planks right over the mortar were up, and some light came through that opening. There was some light upon the staircase, and the door of the engine-room was open. In the engine-room I think there are two windows in the underpinning, and three windows in the other side of the basement of the engine-room. Joyce had charge of the engine on the day of the accident. Goodnow was in charge of the work.

John Senior testified that the plaintiff was caught on the set screw.

The plaintiff offered evidence, that, in the form of set screw and collar in common use, the collar is recessed so as to allow the set screw to sink into the collar flush with the face of the collar, and that there is much less liability of being caught upon this kind of set screw and collar than upon the one upon which the plaintiff was caught; that the superintendent, Way, knew that this set screw and collar were in the place described, and did not inform the plaintiff of its existence, and that the set screw would not be noticed by one looking at the shaft in motion. There was also evidence tending to show that a person dressed as the plaintiff was could come in contact with a smooth shaft without danger, but could not come in contact with the set screw described without being caught ninety-nine times out of a hundred. The defendant offered evidence that the recessed collar described above was not in common use, and that the collar and set screw upon which the plaintiff was caught were in common use.

The judge ruled that on this evidence the plaintiff could not maintain his action, and ordered the jury to return a verdict for the defendant, and reported the case for the determination of this court. If the ruling was correct, judgment was to be entered on the verdict; otherwise, the case was to stand for trial.

H. W. Bragg, for the plaintiff.

H. G. Nichols, (*R. M. Morse, Jr.*, with him,) for the defendant.

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DEVENS, J. It was for the plaintiff to show both that he himself was in the exercise of due care, and that the injury to him was occasioned by the negligence of the defendant. He was an intelligent man, of about thirty-seven years of age, who had been in the employ of the defendant for about three months as a machinist and engineer, employed to run the engine and pumps, and have charge of them. He had previously been employed in this business elsewhere, for three seasons, and part of a fourth, taking the whole care of the engine, and keeping it in ordinary repair. On the day of the accident he had been asked by the superintendent of the defendant's works to repair a stamp under his direction. The superintendent told him "what he wanted done, and how he wanted it done," which was by taking out the lining of the mortar and putting in a new one. The plaintiff assented, and when ready to go to work the superintendent "went in and showed" him "what he wanted done, and what had got to be done." The plaintiff took charge of this job voluntarily. It was not in the regular line of his employment, but was extra work, for which he was to receive extra compensation. The engine was in motion, a shaft passing through the "stamp-room," as it was called, and revolving at the rate of one hundred and seventy times a minute. A set screw projected about an inch from the collar of the smooth shaft, which collar was about three inches broad, and fixed on the shaft contiguous to the box or journal holding the end of the shaft. The set screw was in the middle of the collar, and kept it in its place. The plaintiff was at work about three feet from this set screw, upon the platform on which the mortar was placed. He describes the accident as follows: "I was at work in the stamp-room in front of the mortar here. Scott, from above, lowered the lining down, and it was partly in the mortar, and Morissey and I were pushing it in. I stepped down, put my shoulder underneath the corner to push the lining in, and I was caught. [The witness illustrated with a model the manner in which he did this.] At that time I did not know anything about any set screw being on the shaft; never had any intimation of any such thing. There was nothing in my duties which would require me to see it or know it was there, or to call my attention to it; the next thing that I knew I was going round with the shaft." From

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his own testimony, it further appeared that the plaintiff knew perfectly the object of set screws, which are very common in machinery, and of which there were four or five on his engine. He knew also the danger of revolving machinery, and intended to keep at a safe distance from it. He stated that he knew that the shaft was revolving, and "presumed" that he could have stopped the engine, in which event the accident could not have occurred. The plaintiff did not intend to get within sixteen inches of the shaft, nor could he tell how it happened that in stepping back he got so near the shafting as he did, especially as in moving to put the lining into position his movement would be away from the shafting. Nor, as he testified, could he see any reason why he should have got within six inches of it.

The plaintiff contends upon these facts, that the defendant did not furnish him a suitable place in which to do his work, nor apprise him of the danger to be apprehended from the revolving set screw, which was not in any way connected with the work which he had in hand. But the plaintiff was before familiar with the place in which the work was to be done; he had examined it the same morning, before commencing his work with the defendant's superintendent. He had also, as appears from his statement, at a former time oiled the shafting at the very journal close to which was the set screw by which he was caught. Even if he had not then observed the set screw, or had not seen it on the morning of the accident on account of the revolution of the machinery, or for any other reason, he knew as an engineer that set screws were in constant use, and that from the purpose for which they were employed it might be expected that the collar would be kept in its position by one. There was no danger which, in view of the plaintiff's knowledge and capacity, must not have been well understood by and apparent to him, and there was therefore no negligence on the part of the defendant in exposing him to it. *Coombs* v. *New Bedford Cordage Co.* 102 Mass. 572. *Sullivan* v. *India Manufacturing Co.* 113 Mass. 396. *Russell* v. *Tillotson*, 140 Mass. 201. *Taylor* v. *Carew Manufacturing Co.* 140 Mass. 150.

It cannot be claimed that the machinery used by the defendant was out of repair, or defective and unsuitable for the purpose. There was evidence on the part of the plaintiff that a recessed

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collar was in common use, so made that the set screw was sunk into the collar flush with its face, upon which there was much less liability of being caught than on that used by the defendant. But the plaintiff offered no evidence that the collar and set screw as used by the defendant were not also in common use, while affirmative evidence on this point was offered by the defendant.

As we are of opinion that the plaintiff has failed to show any sufficient evidence of negligence on the part of the defendant, it is unnecessary to inquire whether he has shown that he himself was in the exercise of due care. *Judgment on the verdict.*

ARMINE W. LITTLEFIELD *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

Middlesex. January 18, 1888. — March 2, 1888.

Present: MORTON, C. J., DEVENS, HOLMES, & KNOWLTON, JJ.

Town — Selectmen — Deed — Adverse Possession — Equitable Title — Statute.

A town voted, at a meeting held in November, 1838, to refer the sale of land to a railroad corporation to the selectmen, and in October, 1839, the selectmen then in office made a deed thereof to the corporation. *Held*, that no title passed by the deed.

Land adjoining a railroad was occupied openly, adversely, and exclusively from 1852 to 1880, during which period a railroad corporation claimed an equitable right to it, but did not take actual possession until the latter year. *Held*, that title was gained to the land by adverse possession, and that the St. of 1861, c. 100, relating to such titles, did not apply.

WRIT OF ENTRY, dated August 16, 1884, to recover a parcel of land in Newton. Plea, *nul disseisin*. Trial in the Superior Court, before *Thompson*, J., who allowed a bill of exceptions, which, so far as material, was as follows:

The demanded premises were a strip of land bounded on the east by Rowe Street, on the north by land of the demandant, on the west by land now or late of Washburn, and on the south by land of the tenant. The northerly line of the demanded premises was indicated by a retaining wall recently erected by the tenant, and the southerly line by a straight line, which was at its westerly end fourteen feet and six inches north of the centre

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line between the two present middle tracks of the railroad, and fifteen feet and six inches north of the centre line at its easterly end. The demanded premises, the land of the demandant, and that of the tenant opposite thereto, were formerly a part of the poor-house farm of the town of Newton.

The demandant offered in evidence a deed, dated May 15, 1847, from the town of Newton to William Jackson, which conveyed to him the poor-house farm, "being represented on a plan drawn by Seth Davis, dated April 30, 1847," and "reserving and excepting nevertheless so much of this parcel of land as belongs to the Boston and Worcester Railroad Corporation, whose road runs through the same"; that in 1877 she had acquired title, by mesne conveyances from Jackson, to that portion of the land so conveyed to him which was situated on the northwesterly corner of Rowe Street and the railroad; that the southerly boundary of her land on the railroad was indicated by a picket fence with turned posts; that the fence stood on the southerly line of the demanded premises, and was erected in 1852 by one Adams, who then owned the land of the demandant; that from and after 1852 she and those persons through whom she claimed had occupied the demanded premises; that the tenant destroyed a portion of the fence in 1880 and the remainder in 1883, and since those years had occupied the parts of the demanded premises north of the portion of the fence so destroyed; and introduced the deposition of Washburn, who testified that the fence stood on the southerly line of the demanded premises. The demandant contended that she was entitled to maintain her action by proof of more than twenty years' adverse possession of the demanded premises.

The tenant offered in evidence a deed dated September 25, 1833, from the inhabitants of Newton to the Boston and Worcester Railroad Corporation, of which the tenant was the successor, conveying, in consideration of three hundred dollars, "the receipt whereof is hereby acknowledged," a strip of land through the poor-house farm about forty-six rods long and about two rods wide at its easterly end and about three rods wide at its westerly end, "as now staked out or fenced for said corporation railroad," and covenanting "that said inhabitants will and their assigns shall make, keep, and maintain at all times here-

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after a good and sufficient wall or walls, fence or fences, on the boundary lines between their own lands aforesaid and the premises above granted, which fences or walls shall be forever kept, maintained, and made at their expense and the expense of their assigns."

The tenant also offered evidence that the records of the town of Newton contained a copy of a warrant, dated October 23, 1838, for a town meeting to be held on November 12, 1838, article 4 of which was as follows: "To see if the town will authorize the selectmen to sell so much land on each side of the Worcester Railroad near the poor-house as will make the line straight"; that the record of the meeting of November 12, 1838, contained the following action under article 4: "4th article was referred to the selectmen"; that on October 1, 1839, the "selectmen of the town of Newton, in consideration of eighteen dollars to us paid by the Boston and Worcester Railroad corporation, the receipt whereof is hereby acknowledged," conveyed to it "two certain strips or parcels of land, being a part of the poor-house farm in said Newton, containing about forty-eight square rods lying on both sides of said railroad as it passes through said poor-house farm, and making together with what said railroad corporation had previously purchased a lot of land fifty-six feet wide and about forty-six rods in length. The northerly line of said northerly strip of land being thirty-one feet from the northerly rail of said railroad track," or thirty-eight feet from the centre line between the two present tracks of the railroad; and that the treasurer's books of the town of Newton contained the following entry: "1840, Jan. 1, Cr. Cash of Boston and Worcester Railroad for additional land and removing fences, $30.66." It appeared that the premises described by the deed of 1839 were not wholly occupied by the railroad until 1883.

Edward D. Bolton, called by the tenant, testified that he was a civil engineer; that between April, 1871, and December, 1873, he took certain measurements by which he got the position of the picket fence with the turned posts adjoining the demandant's land; that he measured from the centre line between the two existing tracks of the railroad to the picket fence, which was situated northerly, and distant from the centre line twenty-seven and ten one-hundredths feet on Rowe Street, and seventeen and

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seven tenths feet at the other end thereof; that he also measured from the centre line to where certain fences then were on the southerly side of the railroad opposite the picket fence, and that the measurement was twenty-seven and ninety-five one-hundredths feet near one Kimball's; that he should say that the Kimball fence was an old fence, as it was weather-beaten and had been built some time; that twenty-eight feet measured from the centre line northerly extended into the land beyond the fence he found on the demandant's land, to some extent. On cross-examination, he stated that he did not know whether the fence existing on Kimball's land at the time of the survey corresponded with the present fence there or not.

Walter Shepard, called by the tenant, testified that he was a civil engineer; that the retaining wall, which was built in 1883 upon the demanded premises, was built upon a line parallel with and twenty-eight feet northerly from the centre line, between the centre tracks, which were in the same position as the tracks which existed there in 1873; that the wall was placed upon the line which he obtained from the deed dated October 1, 1839; that a line measured thirty-one feet northerly from the north rail of the first railroad track that was built by the railroad would agree with the face of the retaining wall as it existed at the time of the trial; that the southerly line of a strip of land fifty-six feet wide would agree with the fence on the south side of the railroad, against the land of Kimball, as it existed at the time of the trial; and that, to get a strip of land fifty-six feet wide, measuring from the present fence against Kimball's land, it would be necessary to come out as far as the face of the retaining wall on the northerly side of the railroad.

The tenant further introduced in evidence a deed dated June 6, 1843, from the "selectmen of the town of Newton" to the Boston and Worcester Railroad Corporation, conveying, "in consideration of twenty-seven dollars to us paid" and "the receipt whereof is hereby acknowledged," a strip of land adjoining that previously conveyed on the north, "with the condition that said corporation build at their own expense all the fence necessary on the southerly line of said lot separating the same from the railroad, — said fence to be of as good quality as that lately removed by said corporation, — and when built, said town is to maintain

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the fence on said line hereafter forever." It did not appear that any portion of the land described by the deed of 1843 was occupied by the railroad prior to 1883.

The tenant asked the judge to rule and instruct the jury as follows: "1. That the vote of the town of Newton of November 12, 1838, under article 4 of the warrant, authorized the selectmen to sell so much land of the poor-farm as would make the line straight. 2. The deed of the selectmen of Newton, dated October 1, 1839, and the receipt of the consideration thereof by the town, if proved as facts, establish the boundary of the land of the town and the railroad company, and the town of Newton and persons claiming through or under it are bound thereby. 3. On the evidence in this case, the demandant has shown no title to any part of the strip of land the northerly side of which is parallel with and twenty-eight feet northerly from the centre or base line of the railroad. 4. The deed of September 25, 1833, the deed of October 1, 1839, and the deed of June 6, 1843, to the railroad corporation, if the jury shall find that the town of Newton received the consideration of said deeds, determine the extent of the exception of the deed from the town of Newton to William Jackson, and the jury are authorized upon the evidence to find that, when said town conveyed to Jackson its poor-farm, it did not convey to him any of the land described in said first mentioned deeds, but that the same then belonged to the railroad corporation. 5. The recital in the deed of Newton to Jackson, excepting therefrom whatever then belonged to the Boston and Worcester Railroad Corporation, taken in connection with the fact that the deeds to the company purported to convey the property on which the railroad then existed and was in operation, may be taken by the jury as an admission by the town that those deeds conveyed title to the company."

The judge declined so to rule as requested by the tenant, but instructed the jury that the deed of October 1, 1839, and the deed of June 6, 1843, were not operative to convey any title whatever to the Boston and Worcester Railroad Corporation, and said, "So far as the deed of 1839 is concerned, I rule to you, as matter of law, that that deed did not convey to the Boston and Worcester Railroad Company the piece of land which the parties who made that deed intended to convey; but if the

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Boston and Worcester Railroad occupied or did have possession of only that, if they took a valid deed by that, then I should rule to you that the demandant could not obtain adverse possession; but that is not material, as I have ruled to you as matter of law that no title to that piece of land passed to the Boston and Worcester Railroad Company;" that the case was to stand as if those deeds had never been given; that, if the jury should find that the demandant, and those under whom she claims, had had open, exclusive, and adverse possession of the demanded premises from 1852 to 1880, then, so far as was necessary to obtain a title by adverse possession, the demandant had shown herself to come within the rule; that, if they found for the demandant up to the fence, they should find, upon the evidence, as matter of fact, the line upon which the fence was constructed and maintained, because the demandant does not claim that she has a claim to land south of that fence; and that "no adverse occupation of the land belonging to the railroad corporation since 1852 will give any title against it."

The jury found that the tenant had disseised the demandant of so much of the demanded premises as lay north of a line which was twenty-seven and ten one-hundredths feet north of the centre line between the two middle tracks of the railroad at the easterly end, and seventeen and seventy one-hundredths feet north of the centre line at the westerly end, of the demanded premises, which was the line of the fence as placed by the tenant's witnesses, and northerly of the line as placed by the demandant and by Washburn. The tenant alleged exceptions.

Samuel Hoar, for the tenant, contended, among other things, that the words "land belonging" to a railroad corporation, in the St. of 1861, c. 100,* do not mean simply land to which the rail-

* This statute is as follows: "If the owner or occupant of any land adjoining any railroad in this Commonwealth has taken or shall take into his enclosure any part of the land belonging to said railroad, as located and established, or has erected or shall erect any building upon, or has occupied or shall occupy, for the purposes of cultivation or otherwise, any land belonging to, or included within, the location of any such railroad, no continuance of such enclosure, building, or length of possession or occupancy of the land belonging to such railroad, so enclosed or occupied, shall create in such adjoining owner or occupant, or in any person claiming under him, any right to the land belonging to such railroad so enclosed or occupied."

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road corporation has a perfect title in fee simple, but rather land from which it has a right to exclude intruders; that as to the land described in the deed of 1839, the tenant had paid the town of Newton the purchase money, had paid for removing fences separating it from their original location, had entered into possession and erected new fences, and had taken a deed of it from the selectmen of Newton, which statements were partly true of the deed of 1843; that it became entitled therefore in equity, in 1847 and 1852, to a conveyance from the town of Newton of the legal title of the land described in one or both of these deeds, if it should be decided by the court that those deeds were insufficient to convey the legal title; *Potter* v. *Jacobs*, 111 Mass. 32; and that the words of the statute, "belonging to," included, covered, and protected such a title and interest in the railroad corporation.

E. M. Parker & J. G. Thorp, Jr., for the demandant.

KNOWLTON, J. The evidence at the trial tended to show, and the jury must have found, that from the year 1852 to the year 1880 the demandant occupied openly, adversely, exclusively, and continuously so much of the demanded property as was described by the jury in their verdict. The tenant did not contradict this evidence, but rested its defence solely upon certain deeds and accompanying evidence, under which it claimed an early title, and upon the St. of 1861, c. 100, which prevented the acquisition of titles by adverse possession against railroad companies in certain cases. If it showed such an ownership of any part of the land as to make this statute applicable, the verdict must be set aside; otherwise, it must stand.

To support its claim, the tenant introduced three deeds to the Boston and Worcester Railroad Corporation, to whose rights it had succeeded, made by the selectmen of Newton, and purporting to convey portions of the land of said town, one dated September 25, 1833, another dated October 1, 1839, and the third dated June 6, 1843. There was no evidence that the first covered any part of the demanded premises, nor that the third was ever authorized by said town or recognized by it in any way. The second included in its description a part or all of the land in controversy. If under this deed the land described in it belonged to the railroad, and came within the meaning of the

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language referring to lands of railroads in the St. of 1861, c. 100, the passage of that statute prevented the acquisition afterward of a title to the property by adverse possession, and the previous possession relied on by the demandant having been for less than twenty years, her case was not made out.

Three objections were made to the validity of this deed. First, that the language of the vote of the town under which the selectmen acted was not broad enough to authorize a sale; secondly, that, if authority to sell was given by the vote, it was to the board of selectmen then existing, and not to that of the next year; and thirdly, that the deed was not properly executed to convey the interest of the town

The first and last of these it is unnecessary to consider. For if we assume, as was decided in *Willard* v. *Newburyport*, 12 Pick. 227, in regard to a similar vote, that a reference of this subject to the selectmen conferred upon them authority, not merely to determine what should be done, but to do it, we think the authority was not intended to extend to other boards of selectmen who might be elected in subsequent years. The subject of the vote was a proposed sale of certain land, and the question was whether the town would authorize it. In respect to the answer to be given, it was a question which looked to the present, and not to the future. If the language of the vote is construed as a reference of the whole matter to the selectmen with power to act, it implied that they were to deal with the question presently, and to decide it finally without unreasonable delay. The authority was conferred upon an existing board of public officers. The vote was passed in November, 1838, and, as the law then was, the term of office of all these officers would expire in the following spring, and a new board would then be chosen. It must be presumed that in giving this authority the voters considered the membership of the existing board, and that they did not intend to allow the question to be postponed and afterwards determined by a board of selectmen that might be elected the next or any subsequent year. We think, therefore, that the deed made in October, 1839, was without authority of the town, and that the railroad companies acquired no title under it.

There was no evidence which would warrant the jury in finding that the Boston and Worcester Railroad Corporation, or the

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tenant, had actual possession of any part of the premises described in the verdict prior to the year 1880; and even if the St. of 1861, c. 100, — the language of which is very different from that in the substituted St. of 1874, c. 372, § 107, (Pub. Sts. c. 112, § 215,) — could be held to apply to land outside of a located or established railroad, and if the evidence in this case would warrant a finding that the town of Newton received a consideration for this land, we do not think the equitable right of the tenant or of its predecessor, if either of them had any, would prevent the acquisition of a title by the long continued adverse possession of another.

It follows that the St. of 1861, c. 100, has no application to this case, and that there was nothing to control the effect of the adverse possession proved at the trial. All the requests for instructions to the jury were either in conflict in some particular with the law as we have stated it, or were immaterial, and there was no error in the instructions given.

Exceptions overruled.

ABRAHAM H. GRANGER, administrator, *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

GEORGE W. CHIPMAN, administrator, *vs.* SAME.

Suffolk. January 18, 19, 1888. — March 2, 1888.

Present: MORTON, C. J., DEVENS, HOLMES, & KNOWLTON, JJ.

Railroad — Loss of Life — Contributory Negligence.

A person who enters upon a railroad at a grade crossing when gates with signal lanterns thereon are down, passes in front of an approaching freight train already upon the crossing, and is killed by an express train running on another track at its usual speed and on time, is guilty of contributory negligence, and recovery cannot be had for his death.

TWO ACTIONS OF TORT, by the administrators of the estates of Frederick W. Granger and of Frederick Murray, for causing their death. The second count of the declaration in each case, which alone need be stated, alleged that the intestates, while in the exercise of due care and not passengers or in the defendant's

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employment, were killed at a crossing of the defendant's railroad through the negligence of the defendant. Answer in each case, a general denial.

The cases were tried together in the Superior Court, before *Thompson*, J., who allowed a bill of exceptions, which, so far as material, was as follows:

The intestates were killed at the Cambridge Street crossing, near the Allston station in Brighton, on November 10, 1884, at about ten minutes past five o'clock in the afternoon. At that crossing, Cambridge Street is crossed obliquely at grade by the defendant's railroad, which there consists of four tracks, the first track on the easterly side being used as a freight track, the second for both freight and passenger service, and the third and fourth for passenger service exclusively. On the northerly side of Cambridge Street, and on the easterly side of the railroad, near the first track, there was a gateman's house. The crossing was protected by gates, which swung up and down, and when down closed the whole of the highway on each side of the railroad, and shut in the sidewalks, except between the gateman's house and the gate on that side. At this place the sidewalk was left open when the gates were closed, and the gateman who raised and lowered the gates usually stood upon the sidewalk when his gates were down. On the afternoon of the accident, the plaintiffs' intestates, who were painters, together with Edward S. Cummings, left their work at a place on the easterly side of the railroad, at about five o'clock P. M., it being then about dark, taking with them some unpainted blinds, to go to their homes on the westerly side of the railroad. They reached the railroad crossing at about ten minutes past five o'clock. A freight train from Boston, running on the first track, which was due at the crossing at five o'clock, had entered upon the crossing before their arrival there, and a regular passenger train, which ran express from Boston to Newtonville, was approaching the crossing at the same time, at regular speed and on time, on the third track, the distance between the first and third tracks being about seventeen feet.

Stephen Osgood testified, in substance, that he was a police officer, stationed near the Allston station; that, at the time of the accident, he was standing on the sidewalk, within ten or

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twelve feet of the gate, on the westerly side of the railroad; that, at about ten minutes before five o'clock in the afternoon, the freight train was creeping up pretty slow, — two or three miles an hour; that he saw three men trying to pass the freight train, who had some window blinds under their arms; that he "hollered" at them, and shook his club for them to keep back; that the express train was on the third track, coming from Boston, at from thirty to forty miles an hour; that the freight train was over half-way across the crossing; that the gates were down across the street; that the three men were strung along, one after the other; that Cummings, the one that was saved, was in front; that when he shook his club Cummings jumped, and the other two got caught by the engine of the express train, and were instantly killed; that it was quite dark and a little misty, and the lights were on the gates; that the freight train, if it got half-way across, would hide the express train coming out; that there was nothing to prevent the men from hearing the express train; that the freight train made a good deal of noise; that they took their chances; and that there was time to get by the freight train.

On cross-examination, he testified that he first saw the men when they started to pass the freight train; that the engine on the freight train was about fifteen feet from these men when they started to go across; that he noticed that they were going pretty quick, and pretty close to it; that the first thing he noticed of them they were hurrying to get by the freight train; that the gates were down on both sides, and that the lanterns were hung on the gates in their proper places; that the men might have been three or four feet apart; that there was nothing between Cummings and the train to prevent his seeing the approaching express train; that if he had looked down the track he would have seen it; that there was nothing to prevent a man, who was coming up in the direction these men were coming, from seeing that the gates were down at the crossing; that they could not help seeing that the gates were down, and the lights were hung up; that he had seen Murray going over that crossing before that time; that he had to go across four times a day to and from his work; that this was about the regular time that he came back from his work, at that time of year; that the

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express train was a regular passenger train, which crossed that crossing at that time every night, and that it was on its time. On re-examination, he testified that it was as dark as it generally is about November 10; that the men could see the lights on the gate, if they looked, and it was evident they could see the freight train.

Edward S. Cummings testified that he was a painter, and worked with the two men who were killed; that they quit work at five o'clock P. M., and got up to the crossing about ten minutes past five; that it was dark enough for lights; that when they got to the crossing he was ahead; that when he got to the crossing he saw the freight train moving along slowly; that he noticed the gates were down across the street; that nobody warned him of the coming of the express train; that he did not know it was coming; that Osgood, the police officer, first attracted his attention to any danger; and that, seeing him motion, he sprang forward. On cross-examination, he testified that he had two blinds under his arm, each about thirty inches long, and the others had three apiece; that he could not say how the others carried their blinds when they crossed the track; that there was nothing in the position of the blinds he carried that would prevent him from seeing the train as it came up the track; that the freight train, when he started to go across the track, was a little more than fifteen feet away; that he thought he had time to get by it; that he hurried, because the train was approaching; that he did not know whether the others hurried or not; that he knew that frequently trains were coming in either direction on the four tracks; that he had passed there at about this same time other nights, and his companions had; that he could not say that he looked up or down the track up to the time that he saw the police officer motion, and that he could not say that either of his companions had; that he had not seen anything of the express train, and had not looked to see; that when he started to go across he saw nothing but the freight train; that when he cleared the freight train he did not look down the track at all, and did not look either way; and that he was heading right across to the other sidewalk.

The locomotive engineer on the freight train testified that he remembered going across the crossing at Allston, and saw three

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men hurry across in front of the engine; that they all hurried across; that the last two were on the run; and that they carried some light woodwork on their shoulders. The fireman on the freight train testified that he saw the men hurry to cross in front of his train.

Patrick Ryan testified that he was the gateman at the crossing; that he shut down his gates on the night of the accident for the freight train to come along; and that the lanterns were lighted upon them. On cross-examination, he testified that his lanterns were hung out on the gates before he put them down; that they were hung on hooks, nearer the end than the middle of the gates; that the lanterns were put on before dark; and that he had a flag in the flag-house, but never used it unless the gates were broken or out of order.

The defendant asked the judge to rule and instruct the jury, among other things, that there was no evidence that the plaintiffs' intestates were in the use of due care, or that the defendant was guilty of negligence. The judge refused so to rule, and instructed the jury that these questions were for them, on all the evidence. The jury returned a verdict for the plaintiff in each case on the second count; and the defendant alleged exceptions.

Samuel Hoar, for the defendant.

A. H. Briggs, for the plaintiffs.

MORTON, C. J. In each of these cases the undisputed evidence shows that the plaintiff's intestate was guilty of negligence which contributed to his injury. The accident happened at a grade crossing, each plaintiff's intestate being struck by a passenger express train running on its usual time. It appeared that before they had reached the track the defendant's gateman had lowered the gates, with signal lanterns attached, across the travelled part of the highway, and the only conclusion which can be reached from the evidence is that the parties injured saw that they were lowered.

Railroads, from the necessity of the case, have the right to the exclusive use of grade crossings when their trains are passing, and it is their duty to give suitable warning of such passing trains to travellers upon the highway. If they do this, and the traveller disregards the warning, and without sufficient excuse insists upon crossing, he does so at his own risk.

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In these cases each plaintiff's intestate was warned by the lowered gates that it was unsafe for him to cross the track. It was his duty to wait till the gates were raised; he voluntarily entered upon the track, notwithstanding the warning and without any excuse. This was negligence on his part which caused the accident, and the consequences of his rashness cannot be cast upon the defendant. It is not an answer to say that he may have supposed that the gates were down because the freight train was passing, and he was willing to take the risk of getting safely by that. He had no right so to suppose. It was negligence for him to enter upon the track when he was warned that the railroad required the exclusive use of the crossing for its proper business.

As this is decisive of the cases, it is not necessary to discuss the question whether the evidence shows any negligence on the part of the defendant. *Exceptions sustained.*

JOHN P. CONSTANTINIDES *vs.* JAMES L. WALSH, executor.

Suffolk. January 20, 1888. — March 2, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Husband — Married Woman — Separate Estate — Funeral Expenses.

A husband, paying the funeral expenses of his wife, who has left property, may recover them of her executor.

CONTRACT, upon an account annexed, for the expenses of the funeral of the defendant's testatrix. Writ dated June 18, 1886. Trial in the Superior Court, before *Blodgett*, J., who allowed a bill of exceptions in substance as follows:

Louisa Constantinides, the plaintiff's wife and the defendant's testatrix, died on October 23, 1884, possessed of separate estate, all of which she gave to her son, the step-son of the plaintiff, by her will admitted to probate on November 17, 1884. The plaintiff had no knowledge of the will until three weeks after her death, before which time he had contracted, and on October 27,

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1884, had paid a bill for her necessary funeral expenses, which it was agreed was reasonable. It was not contended that the defendant had, prior to or after his appointment, made any promise of payment.

The defendant asked the judge to rule that the plaintiff could not recover, and the judge so ruled, and ordered a verdict for the defendant; and the plaintiff alleged exceptions.

J. A. Maxwell, for the plaintiff.

G. A. Bruce, for the defendant.

HOLMES, J. The funeral expenses of the testatrix were a preferred charge upon her estate. Pub. Sts. c. 135, § 3; c. 137, § 1. St. 1882, c. 141. Under these statutes, and those establishing the independent position of married women with regard to their property, we think that, as between the estate of a married woman leaving property and her husband, the liability of the estate must be regarded as primary, and that it would be unreasonable to charge the husband for the funeral expenses, in all events, as necessaries, irrespective of any fault on his part. If then it was still, as formerly, the plaintiff's legal duty to see that his wife was buried, but her estate was primarily liable, he is entitled to recover his reasonable expenditures, as in other cases when a person has paid in pursuance of a legal duty what, as between himself and another, that other was bound to pay. There is no technical difficulty in a husband's imposing a liability upon his wife's executor after her death.

If it was not the plaintiff's legal duty to do what he did, nevertheless we are of opinion that he stood on no worse ground than a stranger would have done. A stranger could have recovered against the estate of a man, if he was justified in intermeddling. *Sweeney* v. *Muldoon*, 139 Mass. 304, 306. And formerly, in the case of a married woman, he could have recovered against her husband. *Lakin* v. *Ames*, 10 Cush. 198, 221. *Weld* v. *Walker*, 130 Mass. 422, 423. *Bradshaw* v. *Beard*, 12 C. B. (N. S.) 344. Undoubtedly he could now recover against her estate. If so, the husband can. In such a matter, it is not to be presumed that the husband waives his legal rights, and makes a gift to the estate of his wife, in the absence of any expression or other evidence to that effect. *Exceptions sustained.*

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AUSTIN FORD *vs* GARRETT LINEHAN.

Suffolk. January 18, 1888. — March 2, 1888.

Present: MORTON, C. J., DEVENS, HOLMES, & KNOWLTON, JJ.

Contract — Agency — Evidence.

An only son without much property, who was his father's general agent for the transaction of all his business, signed a contract in his own name for a large amount of stone-work on his father's burial lot, told the latter about the contract, and conferred with him during the progress of the work, nothing being said about its being a gift to the father. The father, who had considerable property, was seventy-three years old; had been confined to his house for five years by sickness; had prior to his sickness had the idea of having this work done, and had consulted his wife about it; and had signed an application for a permit to do it. *Held*, that evidence of these facts would warrant a finding that the son was acting as his father's agent in signing the contract and doing the work.

CONTRACT to recover $629.75, $580 being for stone-work upon the defendant's lot in Calvary Cemetery, under a written agreement dated September 22, 1884, and signed by the plaintiff and Denis A. Linehan, and $49.75 upon an account annexed, for work done and materials furnished in connection therewith. Writ dated September 2, 1885.

Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions, in substance as follows:

The defendant, who was the father of Denis A. Linehan, contended that he was not a party to the contract, and testified by deposition, in answer to questions put by the plaintiff's counsel, that he had been confined to his house for about five years with rheumatism; that he was the owner of a lot in Calvary Cemetery; that he had not authorized anybody to put any stone-work, such as curbing, posts, and steps, on that lot; "but I would if I was able to go out. Myself and mother was about fixing that lot with curbing around it, when I got sick. That is all I done with it, except that my son told me afterwards he had done it. He did not tell me he was going to do it, and asked me nothing about it. He done it himself"; that he could not tell when he heard for the first time that the stone was being put into the lot, or when his son told him about it; that he did not know what his son told him, "except that he settled

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with the man to put a curb around the burial lot," and that he said it was Ford; that his son stated the amount, but he did not remember it, it was not a thousand dollars; that his son did it of his own accord, and did not tell him about it until he had done it; that after the work was done, his son "said it was not done right, that they appointed another lot to be made like it, that it was not done according to agreement"; that when his son told him that he had made a contract with Ford he did not know what he said to him, "I am so forgetful that I don't remember"; that it was his intention at that time to improve his lot; that he owned three houses; that his son looked after his houses, collected the rents, &c.; that he did not allow his son to do anything the latter saw fit for him, and that when his son "put an awning over the store without my knowledge and consent, and I did not approve of it, he paid for it himself"; and that his son purchased the burial lot for him. On cross-examination the defendant testified that he was about seventy-three years old; that when he spoke of "mother" he meant his wife; that he never promised to pay for the stone-work on his lot; that he never authorized his son to make any agreement that he should pay for such stone-work; that he did not know of his son's contracting with Ford before the contract was made; that after the contract was made with Ford he did not agree, promise, or intend to pay Ford if he performed the contract, and that Ford did not ask him to pay; and that he had but one son.

Denis A. Linehan, called by the defendant, testified that he procured from his father, the defendant, and delivered to Ford, an application addressed to the superintendent for a permit to do the work as required by the by-laws of Calvary Cemetery; that the plaintiff had never in any conversation with him, or to his knowledge, made any claim or demand on the defendant for payment; and that he intended to put the stone-work on the lot and pay for it out of his own pocket; and that he was in the grocery business.

On cross-examination, he testified that the plaintiff had never seen the defendant; that he had told the plaintiff what his father's name was before and at the time the contract was signed; that he attended to all his father's business; that his father owned the burial lot; that his father had never author-

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ized him to put the curbing around it, but that he told his father that he was doing it; that he himself was to pay for it; that he spoke to his father about the work not very often, but spoke to him oftener after the trouble commenced; that he told his father that he had signed the agreement with the defendant to put the stone-work on the lot, what the price and style were to be, and when the work was to commence and finish; that he did not show his father the contract, did not read it to him, nor tell him the substance of it; that he told his father all about the trouble with the defendant; that his father, as a matter of fact, left the whole thing to him; that his father did not disapprove of anything that he did; that he never stated to his father that it was going to be a gift; and that he had no property except his business.

It appeared that the stone-work was placed on the lot in June or July, 1885, and that on July 25, 1885, the plaintiff sent to Denis A. Linehan a bill entitled "Denis A. Linehan to Austin Ford, Dr.," for $580 for the stone-work on the lot.

The defendant asked the judge to rule that there was no evidence which would warrant the jury in finding that the defendant was a party to the contract; but the judge refused so to rule, and submitted the case to the jury with instructions not excepted to. The jury found for the plaintiff; and the defendant alleged exceptions.

J. A. Maxwell, for the defendant.

T. F. Maguire, for the plaintiff.

MORTON, C. J. The written contract for the work which is sued for was signed by the son of the defendant; but if the plaintiff can prove that in contracting for the work the son was acting as the agent of the defendant, this action can be maintained. Whether he was so acting, is a question of fact for the jury, and we are of opinion that there was evidence at the trial which was properly submitted to them upon this issue.

It appeared that the defendant was seventy-three years old, and had been confined to his house for five years by rheumatism; that he was a man of considerable property; that he was the owner of the lot in the cemetery on which the work was done; and that before the work was begun he signed an application for a permit to do it, addressed to the superintendent of

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the cemetery. There was evidence tending to show that the son had very little property, that he told the defendant of his contract with the plaintiff, and conferred with the defendant from time to time during the progress of the work; that he was an only son, and his father's general agent for the transaction of all his business affairs; that the defendant, before he was taken sick, had in his mind the idea of putting curbing about his lot, and consulted with his wife about it; and that neither during the work nor after it was completed was anything said between the father and the son to show that it was intended by the latter as a gift to his father. The circumstances of the parties make it very improbable that he would or could make so large a gift.

All the evidence points to the inference that the son was acting for his father, and that both so understood it; and we think the jury might fairly draw this inference, notwithstanding the testimony of the defendant and his son to the contrary. They saw the witnesses, and could best judge of the credit to which they were entitled. *Exceptions overruled.*

FREDERICK H. RINDGE & others *vs.* NEW ENGLAND MUTUAL AID SOCIETY.

Suffolk. January 23, 1888. — March 2, 1888.

Present: MORTON, C. J., W. ALLEN, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Beneficiary Association — Administrator — Action — Forfeiture — Waiver.

A certificate in a beneficiary association stated that it was for the benefit of "friends," but provided, in case no beneficiaries, original or substituted, survived, that it should enure to the benefit of "legal heirs." An action was brought by the friends to recover on the certificate, but subsequently the member's administrator was admitted to prosecute it, as his declaration averred, for the benefit of such friends. *Held*, that the designation of "friends" as beneficiaries, though invalid, would not avoid the contract, but that the administrator might recover for the benefit of the heirs only, the averment as to friends being disregarded.

The levy and acceptance of assessments by a beneficiary association without condition, after the conditional acceptance of a prior overdue payment, is a waiver of the right to avoid a certificate for delay of payment.

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CONTRACT to recover $5,000 on a certificate of membership in the defendant association issued to Thomas G. Rice. The plaintiffs moved to amend their writ and declaration by admitting the administrator of Rice to prosecute the action, and an amended declaration was filed, which alleged that the defendant owed the amount due on the certificate to such administrator "for the benefit of" Frederick H. Rindge, Clarissa H. Rindge, and Francis J. Parker, administrators of the estate of Samuel B. Rindge, the original plaintiffs, who were "the beneficiaries under said policy for whose benefit this action is brought."

Trial in the Superior Court, without a jury, before *Thompson*, J., who reported the case for the determination of this court, in substance as follows:

On July 7, 1883, Rice was indebted to the Rindges and Parker, as administrators, in the sum of $6,363, and on that date the defendant, a beneficiary association incorporated under the St. of 1874, c. 375, as amended by the St. of 1877, c. 204, issued the certificate to him as collateral security for that indebtedness. The certificate, which was numbered 964, stated "that said Thomas G. Rice is a member of class 5 in said society, and for the benefit of friends, Clarissa H. Rindge, Frederick H. Rindge, and Francis J. Parker, administrators of the estate of Samuel B. Rindge, unless said member shall, at any time, or from time to time hereafter, in writing, assented to by said society, substitute some other beneficiary or beneficiaries, and in that case for the benefit only of the beneficiary or beneficiaries last substituted, as aforesaid, before the death of said member; but if said member shall survive each and all the original beneficiary or beneficiaries, or, in case of substitution, each and all the beneficiary or beneficiaries last substituted, as aforesaid, then for the benefit only of the legal heirs of said member," and contained the following condition: "If said member . . . . shall omit or neglect to pay to said society within thirty days of date of notice . . . . any regular assessment of five dollars 25-100 that may be made by said society upon him under this certificate, then, in every or either event above named, this certificate shall thereby become null and void." In the application upon which this certificate was issued, Rice agreed that, upon any omission or neglect for a period of thirty days after notice to pay any such assessment, the contract

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on the part of the society should thereupon become null and void, and that printed notices mailed thirty days in advance should be sufficient notice of any assessment levied.

On July 18, 1885, a notice of an assessment, dated July 17, 1885, was put into the mail addressed to Rice at his residence, which the judge found was delivered to him on July 20, 1885. On August 17, 1885, Rice was taken ill, and so continued until his death on December 17, 1885, due proofs of which were furnished. On August 19, 1885, Rice's son found the notice above referred to in his father's pocket, and sent it, with the amount of the assessment, to the office of the defendant, where it was receipted by the treasurer and handed back, stamped, "This assessment is accepted on condition that the member is in good health." Nothing was said on either side as to the condition of Rice, who subsequently refunded the amount of the assessment so advanced by his son. The defendant subsequently levied six different assessments on Rice, and accepted payment of the same unconditionally, without making any inquiry as to his health, and it knew nothing about his health until after his death.

The judge ruled that the certificate was forfeited by reason of the nonpayment of the assessment called for by the notice dated July 17, 1885, within thirty days therefrom, and that there was no evidence to justify him in finding a waiver of the forfeiture, and found for the defendant. If either of the rulings were erroneous, judgment was to be entered for the plaintiff, unless upon the other facts the plaintiff could not recover, in which case judgment was to be entered for the defendant.

H. Wheeler, for the plaintiffs.

F. D. Ely, for the defendant.

C. ALLEN, J. The designation of beneficiaries in the policy or certificate of membership is invalid, as the statutes under which the defendant corporation was organized did not authorize it to grant insurance for the benefit of friends. *Daniels* v. *Pratt*, 143 Mass. 216, 221. But an invalid designation of beneficiaries does not render the whole contract invalid. The contract in terms recognizes that there may be a change or substitution of beneficiaries, and there is a provision that, if the member shall survive all original or substituted beneficiaries, then his membership shall be for the benefit of his legal heirs. This provision is

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within the authority of the St. of 1882, c. 195, § 1, heirs being included under the head of relatives; and if there is no other legal designation, this may take effect. *Daniels* v. *Pratt*, *ubi supra*. By an amendment, the action is now prosecuted in the name of the administrator of the estate of the assured, and he is the proper party to maintain the action. *Bailey* v. *New England Ins. Co.* 114 Mass. 177, and cases cited. *Flynn* v. *North America Ins. Co.* 115 Mass. 449. *Unity Association* v. *Dugan*, 118 Mass. 219. This is not controverted; but the defendant contends that the declaration avers that the action is brought for the benefit of the Rindges and Parker, and therefore that the action cannot be maintained. This objection cannot be supported. If the plaintiff receives the money, it will be a good discharge to the defendant of its liability; and the defendant will not be responsible for the proper application of the money by the plaintiff. It is to be assumed, at this stage of the proceedings, that he will dispose of the funds properly; and he may be compelled to do so by judicial proceedings, to which the defendant would not be a necessary party. *Gould* v. *Emerson*, 99 Mass. 154. *Bailey* v. *New England Ins. Co.* 114 Mass. 177. The averment that the action is brought for the benefit of the Rindges and Parker is unnecessary, and may be disregarded.

Since the action is now prosecuted by the proper plaintiff, we need not consider the effect of the St. of 1885, c. 183, which the plaintiff relies on as enlarging the effect of the defendant's contract. The other objections to the plaintiff's recovery depend on the same facts which were considered in the case of Rice against this same defendant, *ante*, 248, where it was held that the defendant must be deemed to have waived the forfeiture.

According to the terms of the report, the entry must be,

Judgment for the plaintiff.

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PATRICK J. HOAR *vs.* JOHN W. ABBOTT & others.

Middlesex. January 24, 1888. — March 2, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Evidence.

If a person alleges that he acted in consequence of a request in a conversation not given in terms, another conversation had at the same time by the requesting party with another person, in which the former asks the latter to do the same thing, is admissible as tending to disprove the first.

TORT for personal injuries sustained by the plaintiff while at work upon a preparing machine in the defendants' mill.

At the trial in the Superior Court, before *Knowlton*, J., it appeared that in the room in which the accident occurred there were ten of these machines, in the management of which five men, including one Casey, were regularly employed, and that the plaintiff, then a boy about fourteen years of age, was on that day regularly at work in the same room, but not on any of these machines.

The plaintiff contended, and introduced evidence tending to show, that at the time of the accident there was a usage or custom in the defendants' mill, permitting the workmen regularly employed in running these preparing machines, when obliged to be temporarily absent therefrom, to call upon other of the defendants' employees engaged in the same room to look after and run the machines during such temporary absences; and in order to show that he was, at the time of the accident, employed by the defendants to work on this machine, and as the only evidence of such employment testified that, on the day of the accident, shortly before it occurred, Casey went out, and that the plaintiff had a conversation with him as he was about to go, the terms or substance of which were not put in direct evidence, and that, in consequence of this conversation, he tended Casey's machine during his absence.

The defendants contended, and offered evidence to show, that this custom or usage authorized the operative, under the circumstances mentioned, only to call on workmen regularly employed

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in running similar machines to attend to and run his machine during his absence; that the custom did not extend so far as to permit the calling in of any except workmen engaged on similar machines, or so far as to warrant the plaintiff, or any person of his age and inexperience, in attempting to run the machine; that the plaintiff was not required, in the discharge of his duties, to attempt to do so, or to go into close proximity to it; that the accident occurred while the plaintiff was attempting, without right, authority, or direction, and against positive orders, to run the machine; that when Casey left his machine, shortly before the accident, as testified to by the plaintiff, he called one O'Brien, who was employed on a similar machine, and so within the custom; and that, during Casey's absence, O'Brien was engaged in tending Casey's machine, together with his own.

The defendants called O'Brien as a witness, who, in reply to the question, "Did you have any talk with Casey at the time, or just preceding the time, that Casey went away from his machine?" was permitted, under objection, to state the conversation between Casey and himself.

The jury returned a verdict for the defendants; and the plaintiff alleged exceptions.

N. P. Pratt & E. B. Quinn, for the plaintiff.

Samuel Hoar, for the defendants.

HOLMES, J. The plaintiff was injured by a machine which it was not his regular duty to tend. He alleged that he was employed by the defendants to tend it at the time. The defendants' evidence, on the other hand, was that he was intermeddling without right and against order. To make out that he was employed, the plaintiff put in evidence that there was a known custom of the workmen in the mill employed to run such machines, when obliged to absent themselves temporarily, to call in other employees, and that the regular workman, Casey, went out, and just before doing so had a conversation with him, in consequence of which the plaintiff attended to Casey's machine during his absence. To meet this, the defendants put in the testimony of O'Brien, another workman, that Casey just before going out asked him to attend to his machine, and that he did so. The only exception is to the admission of what Casey said to O'Brien.

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The conversation referred to the occasion testified to by the plaintiff, and was alleged to have happened at the same time as that on which the plaintiff alleged the conversation with himself to have taken place. O'Brien's evidence therefore tended to show that the plaintiff was not requested to attend to Casey's machine. For the jury would have been warranted in finding that there was only one conversation upon the matter, and that that was a request from Casey to O'Brien; and even if the alleged conversations had been placed a moment apart by the respective witnesses, and that with O'Brien had taken place in the plaintiff's absence, it would have been unlikely that Casey, within a few minutes, would have requested two persons to take charge of the same work at the same time.

A request from Casey was none the less material to the plaintiff's case, that he did not testify to it in terms, but left it to be inferred from the other facts put in evidence. The conversation with O'Brien was properly admitted as tending to disprove it.

Exceptions overruled.

WELD SPALDING *vs.* EDMUND B. CONANT.

Middlesex. January 25, 1888. — March 2, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Contract — Writing — Reformation — Mutual Consent.

If the parties to a written contract correct it by mutual consent to make it conform to their actual agreement, such amended writing is valid and binding.

CONTRACT for breach of warranty of soundness in the sale of a horse.

At the trial in the Superior Court, before *Knowlton*, J., it appeared that the plaintiff bought the horse of the defendant, who gave him a bill of sale, which described the horse and set forth merely that it was "warranted not to interfere behind from swelling on nigh hind ankle, with proper treatment." There was evidence tending to show that the defendant had previously agreed to give a written warranty of soundness of

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the horse with the exception of the ankle; that the plaintiff, when the paper was handed to him, noticed that it did not contain such a warranty, but took it without objection; that two or three days afterward he went to the defendant, told him that he had offered to give a written warranty of soundness of the horse, and asked him to write it into the bill; and that the defendant then wrote upon the bill of sale the words, "This horse is warranted sound, with exception of before mentioned ankle." The defendant admitted that he wrote the warranty upon such request, for which there was no new consideration, and there was no evidence that he made any objection to so doing.

The defendant asked the judge to rule: "1. The warranty of soundness contained in the bill of sale and written therein after the horse had been sold, paid for, and delivered, in the absence of any new consideration, is void. 2. The plaintiff can only recover upon showing a breach of the warranty contained in the bill of sale at the time the same was signed and delivered."

The judge refused so to rule, but ruled as follows: "If in making the agreement for a sale the defendant made affirmations which were intended by him to be relied on as part of the contract, and were relied on as such by the plaintiff, to the effect that the horse was sound except for the swelling at the ankle, and both parties at the time they concluded their parol bargain understood that by that contract the horse was warranted sound except as to his ankle, and the defendant then made and the plaintiff received the writing which has been introduced in evidence with no provision in it as to soundness except as to the ankle, and the parties did not intend thereby to change their parol contract, and the plaintiff two or three days afterward asked the defendant to write the warranty into the contract, and the defendant then wrote the words that appear around the edge of the original writing, with a view to make the writing correctly express their contract as it was at the time the paper was originally made, and delivered the paper in its amended form as the true statement of their contract, and the plaintiff received it as such and it was such, and it was delivered and received as a binding contract, the defendant is bound by it in its amended form."

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The jury found for the plaintiff; and the defendant alleged exceptions.

J. N. Marshall, for the defendant.

F. T. Greenhalge, for the plaintiff, was not called on.

C. ALLEN, J. In this case it must now be assumed that the bill of sale as originally delivered did not contain the whole of the bargain actually made between the parties, and, upon attention being called to the omission, the defendant, for the purpose of making the writing conform to the actual agreement, inserted the warranty upon which the action is brought. The defendant's counsel now contends that the plaintiff had accepted the bill of sale without this warranty, and that, having done so, he could not have maintained an action upon the oral warranty, because the bill of sale would have been treated as showing the whole of the contract, and that therefore the warranty inserted in the bill of sale must be treated as a new contract, which was invalid for want of a new consideration to support it. There is, however, no rule of law which prevents parties who discover that their contract has not been correctly expressed in the written instrument, from correcting the writing by mutual consent so as to make it conform to their actual agreement; thus doing voluntarily what might be compelled in equity, on a bill to reform the contract. The instructions were correct.

Exceptions overruled.

HENRY D. SMITH *vs.* JOHN O'BRIEN.

Suffolk. January 25, 1888. — March 2, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Judgment — Review — Waiver.

A judgment debtor who makes a part payment on the judgment, and thus secures a postponement of levy of execution, thereby waives his right to a review.

PETITION to the Superior Court, alleging that, on May 20, 1887, the respondent recovered judgment against the petitioner in the Municipal Court of the city of Boston for the sum of $69,

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damages, and $12.88, costs of suit, in an action of contract; that an execution issued on said judgment on May 21, 1887, which was unsatisfied; and praying for a *supersedeas*, or stay of the execution, and that a review of the action might be granted.

At the hearing, without a jury, before *Thompson*, J., it appeared, in addition to the facts stated in the petition, that on May 23, 1887, the respondent's attorney notified the petitioner to come to his office and pay the execution by three o'clock P. M. on the next day; that the petitioner came on May 25, 1887, and informed the respondent's attorney of his intention to obtain a review and *supersedeas* of the judgment and execution; that the respondent's attorney immediately informed him that the execution would be placed in an officer's hands for levy on his property; that during this conversation an officer came into the attorney's office to receive the execution for that purpose, the petitioner was so informed, and payment of the execution was demanded; that thereupon the petitioner paid to the respondent's attorney the sum of twenty-five dollars in part payment of the execution, and promised to come to the attorney's office and pay the balance upon the following Tuesday, and also paid the officer one dollar for his trouble, whereupon the attorney agreed to refrain from enforcing the execution till that day; and that the petition was sworn to by the petitioner the same day that he made the part payment of twenty-five dollars, and that it was filed and *supersedeas* issued the next day.

The respondent asked the judge to rule: "If the court is satisfied, from the record and from the petitioner's own testimony or other evidence in the case, that the petitioner paid a part of the judgment sought to be reviewed on May 25, 1887, the same day on which he made oath to his petition, and before the same was filed, and before a *supersedeas* was issued, and at the same time promised to pay the balance of the judgment the following week, then the court must rule that in law and by statute the petitioner has waived his right to a review, and is not entitled thereto."

The judge declined so to rule, and granted the petition; and the respondent alleged exceptions.

S. H. Dudley, for the respondent.

I. R. Clark, for the petitioner.

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KNOWLTON, J. Assuming that the petitioner could have maintained a petition for a writ of review when he entered the office of the respondent's attorney on May 25, 1887, he there made an agreement for a valuable consideration, which was inconsistent with the continuance of his right to have a *supersedeas* and set aside the judgment upon a review. As soon as he informed the attorney that he intended to obtain a *supersedeas* and a review, he was told that the execution would be immediately enforced by a levy upon his property, and upon the officer's coming to get it for service, he gave the attorney twenty-five dollars in part payment of the judgment, paid the officer one dollar for his trouble, and made an oral contract with the attorney to pay the balance of the execution the following Tuesday, upon the attorney's agreeing to refrain from enforcing it until that time. By this arrangement the respondent's right to secure his execution by an immediate levy upon property was released, and the petitioner's right to treat the judgment as voidable was waived and given up.

The respondent's first prayer for a ruling must be considered in connection with the fact that his attorney, as a part of the transaction referred to in the prayer, agreed with the petitioner to refrain from enforcing the execution until the following Tuesday, and the court should have ruled as therein requested.

Exceptions sustained.

SAMUEL B. LOGAN *vs.* JAMES R. DOCKRAY.

Suffolk. February 2, 1888. — March 2, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Contract — Construction — Written Agreement.

A written agreement by the assignee of a mortgage to pay to his assignor "one half of the amount collected on said mortgage over and above" or "in excess" of the sum paid by him in cash upon the assignment, must be construed to mean the gross amount so collected, without deducting expenses or disbursements.

CONTRACT for breach of the following agreement: "S. B. Logan, of Chelsea, having assigned to me a chattel mortgage

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signed by John W. Fletcher, and dated February 5, 1884, I hereby agree to pay to said Logan one half of the amount collected on said mortgage over and above one hundred and fifty dollars. That is, I agree to pay to said Logan one half of the excess over one hundred and fifty dollars collected on said mortgage by me or my assigns. James R. Dockray. Boston, May 9, 1884."

At the trial in the Superior Court, before *Bacon*, J., it was admitted that the mortgage referred to in the agreement was a second mortgage of the face value of $350, subject to a prior mortgage of $2,500 upon the same chattels. The defendant offered to prove that whatever he received over and above $150, the amount paid by him to the plaintiff upon the assignment of the second mortgage to him, was used by him in protecting the second mortgage from being wiped out by the sale of the chattels under a foreclosure of the first mortgage, and in expenses incurred in collecting the amount of the second mortgage, and contended that the written contract should be construed as an agreement to divide the net amount received from the second mortgage in excess of the $150 paid by him to the plaintiff, and not as an agreement to divide the gross amount in excess of that sum, and requested the judge so to rule.

The judge declined so to rule, but ruled that, under the agreement, the defendant was liable to the plaintiff for one half of the gross amount in excess of $150 collected by him on the second mortgage, without deducting the expenses and disbursements incurred and paid out by him in so doing; and the defendant alleged exceptions.

H. J. Edwards, for the defendant.

O. B. Mowry, for the plaintiff.

C. ALLEN, J. The defendant took from the plaintiff the assignment of the second mortgage, of the face value of $350, subject to a prior mortgage of $2,500 upon the same chattels, for which he paid to the plaintiff $150 in money, and gave to him the written agreement declared on, by which he promised to pay to the plaintiff "one half of the amount collected on said mortgage over and above $150"; that is, "one half of the excess over $150 collected on said mortgage by me or my assigns." The defendant now contends that he is only bound to pay one half of

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the net amount collected by him over and above the $150, after deducting certain disbursements and expenses. But the agreement does not admit of this construction. There is nothing in the agreement to show that it was understood that the defendant would necessarily be put to any disbursements or expenses, or, if so, that they would probably be considerable in amount. The defendant took his chance. He was to retain $150 at all events, to reimburse himself for the sum paid to the plaintiff, and also to retain one half of the excess above that sum. If he had meant the net excess, after deducting whatever payments he might see fit to make, he should have said so. But there is nothing to show that he did not consider himself sufficiently protected by the reservation of one half of the gross excess; and such is the meaning of his words.

Exceptions overruled.

GEORGE W. COLLINS *vs.* MAYOR AND ALDERMEN OF HOLYOKE.

Hampden. October 4, 1887. — March 3, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Certiorari — Pleading — Betterment — Sewer Assessment — Notice — Ordinance.

If a petition for a writ of certiorari to quash an assessment levied by the mayor and aldermen of a city is reserved by a single justice of this court for the consideration of the full court, upon a petition sworn to by the petitioner, and an answer filed by a succeeding board, the averments of the answer are to be taken as true.

Under the Pub. Sts. c. 50, § 1, as to the laying and making of common sewers, the mayor and aldermen of a city may order a sewer to be "built" by a joint committee of the city council.

Notice need not be given by the mayor and aldermen of a city of their intention to lay out and construct a sewer, and to levy assessments therefor, to a person to be benefited thereby.

It is no objection to a sewer assessment that a mayor and aldermen called in another person to assist them in making it.

The sewer ordinance of Holyoke of 1875, §§ 2, 5, requiring the superintendent of sewers to keep and submit to the mayor and aldermen an account of the cost of constructing a sewer, and to report a list of the persons benefited, is directory merely; and his failure to do so will not avoid a sewer assessment.

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Sewer assessments may, as a mode of equitable adjustment, be divided by the mayor and aldermen of a city "into three classes, direct benefit, remote benefit, and more remote benefit."

A notice in writing of a sewer assessment, with a demand of payment, given to a person benefited, by a city treasurer, under an order of the mayor and aldermen directing him to collect it, is sufficient.

The petition also alleged that the order of levy applied only to "abutters," the petitioner not being such; that the city records did not show the expense of the sewer; that no benefit was derived from the same; that the assessment was not made by the board, which had never made any legal assessment; that other persons similarly situated or abutting on the sewer had not been assessed; and that the time when the proportions of assessments should be paid had not been fixed. The answer of the board alleged that the use of the word "abutter" was a clerical error that had been corrected; that the records did disclose such expense; that the question of benefit could not be raised; that the board had made the assessment and that it was legal; that all persons benefited had been assessed; and that such time had been fixed. *Held*, that the writ ought not to issue.

PETITION for a writ of certiorari to quash the proceedings of the mayor and aldermen of the city of Holyoke, in assessing a proportionate part of the cost of a sewer in Lyman Street in that city.

The petition, and an amendment thereto, alleged that the mayor and aldermen, on March 24, 1885, adopted the following order: "*Ordered*, That the committee on sewers and drains be hereby authorized and instructed to construct a trunk sewer as follows, viz. in Canal and Lyman Streets, commencing at the outlet under the second level canal, opposite the Winona Paper Company's Mill, and terminating at the Connecticut River Railroad Company's Dry Bridge (so called), extending across Lyman and Canal"; that the petitioner owned an estate on Ely Street, not abutting on Lyman Street or on the line of the sewer; that the board of aldermen, on December 29, 1885, attempted to levy an assessment for the construction of the sewer by a vote, which, so far as material, was as follows: "Assessments on the abutters for the construction of sewers and sidewalks were levied as follows, and signed by the mayor and aldermen, viz. trunk sewer in Lyman Street, from Race Street to Canal Street, total $6,630.86"; that the above order and vote were all the records of the board of aldermen relating to the sewer; that the sewer had been constructed and a warrant had been issued by the mayor and aldermen to the city treasurer instructing him to collect $51.84 of the petitioner,

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that being the amount of his alleged assessment for the construction of the sewer, for which the following demand had been made upon him: "City of Holyoke, City Solicitor's Office, December 27, 1886. Geo. W. Collins: A sewer assessment amounting to $51.84 has been placed in my hands for collection. Please attend to the matter at once, and save further costs. T. B. O'Donnell, Solicitor"; that neither the petitioner nor his estate derived any benefit from the sewer, either by the entry of any particular drain, or by more remote means, and that his estate had ample sewerage previous to the construction of the sewer; that the board of aldermen did not fix the time when the proportion of any alleged assessments charged upon persons benefited by said sewer should be paid; that there was no record of the board of aldermen that the superintendent of sewers ever kept and submitted to the board an account of the cost of constructing the sewer and all other expenses in relation thereto, as was his duty under the ordinances of the city; * that the superintendent of sewers did not report to the board of aldermen a list of the persons and estates deriving benefit from the sewer, and there was no record of any such report; that there was no record that the board of aldermen ever assessed the petitioner $51.84, or any other sum, as his portion of the expense of the sewer; that a person not the superintendent of sewers, and not a member of the city council, made a list of persons who ought to be assessed, and of the amounts to be assessed, in which was the petitioner's name, and opposite it $51.84; that this list and the amounts therein were the only basis for the warrant, demand, and a notice of sale of the estate; that the sewer was built under the supervision and direction of a joint committee, composed of four members of the common council and three aldermen; that other persons

* The sewer ordinance of Holyoke of 1875 contains these provisions:

"Section 2. The superintendent of sewers shall keep and submit to the mayor and aldermen an accurate account of the cost of constructing each main drain or common sewer, and of all other expenses in relation thereto, and he shall, annually, in December, submit a report of all work performed and the amount of all expenditures for sewers and drains."

"Section 5. The superintendent of sewers shall keep an accurate account of the expense of constructing and repairing each main drain or common sewer, and shall report the same to the board of aldermen, together with a list of the persons and estates deriving benefit therefrom."

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owning land similarly situated with respect to the sewer, and deriving as much benefit therefrom, were not assessed, or in any manner required to pay for any portion of the expense of the construction of the sewer; and that persons owning land abutting on Lyman Street and the line of the sewer were not assessed or required in any manner to pay for any portion of the expense of the construction of the sewer.

The petition, as amended, averred that the assessment was illegal and void, for the following reasons:

"1. Because he is not an abutter upon said Lyman Street, or the line of said sewer. 2. Because the records of said city do not show what was the actual expense of constructing said sewer, in any legal or proper form. 3. Because the superintendent of sewers did not keep and submit to the board of aldermen an account of the cost of constructing said sewer, and all expenses in relation thereto. 4. Because the superintendent of sewers made no report to said board of the cost of constructing said sewer. 5. Because said superintendent of sewers did not report to said board a list of the persons and estates deriving benefit from said sewer. 6. Because the alleged assessment upon your petitioner was not made by the board of aldermen, and because said board never made any legal assessment for cost of constructing said sewer. 7. Because said sewer was not constructed by the mayor and aldermen, as required by law, and because no legal demand for payment of any assessment was ever made on your petitioner, and because no notice of any assessment or charge was ever given him. 8. Because various persons owning land situated on and abutting on line of said sewer, and various other persons owning land situated with respect to said sewer similarly to your petitioner's land, and deriving as much benefit therefrom, have not been assessed or required to pay for any portion of the cost of said sewer. 9. Because said alleged assessment, and the attempts to enforce the same, are invalid and illegal on account of divers other omissions, irregularities, and errors. 10. Because said petitioner or his estate does not derive any benefit from said sewer, either by entry or by more remote means, and because his said estate had ample sewerage previous to the construction of the sewer in question. 11. Because the board of aldermen did not fix the

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time when the proportion of any alleged assessments charged upon the persons benefited by said sewer should be paid."

The following affidavit was annexed to the petition: "Commonwealth of Massachusetts, Hampden, ss. May 14th, 1887. Subscribed and sworn to before me. William H. Brooks, Justice of the Peace."

The answer, and amendments thereto, admitted that the mayor and aldermen ordered the sewer to be built, and that they made and laid the same; that the petitioner was the owner of the lot of land as alleged; that the petitioner was not an abutter on Lyman Street, or on the line of the sewer, in the sense that the land of the petitioner did not adjoin Lyman Street, and was not directly on the line of the sewer, "but the said assessment is not affected thereby"; that no notice was given to the petitioner of the intention to construct the sewer, as the mayor and aldermen were under no obligation to give such notice, and their "failure to give it in no way affects the validity of the assessment"; that the assessment was made to "abutters," but the use of that word was an error made by the clerk, who had amended his records in that respect, and "the use of the word 'abutters' did not affect the validity of the assessment"; that the order for the construction of the sewer, as set forth in the petition, was correct; that there was no record of the board of aldermen that the superintendent of sewers kept an account of the cost of constructing the sewer, and that the superintendent did not report to the board a list of persons and estates deriving benefit from the sewer, but "the failure of the superintendent to make such report, and the fact that there is no such record of the board of aldermen, do not affect the validity of the assessment"; and that the mayor and aldermen employed the chairman of the board of assessors, on account of his large experience, to aid and assist them in making the assessments, by furnishing them with a list of the names of the persons who he thought ought to be assessed, and the amount for which he thought they ought to be assessed. "They deny that said list and amounts so made were the only basis of said warrant, demand, and notice; and they say that the superintendent of sewers furnished them with the cost of said sewers, by which they were enabled to make said assessments."

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The answer, as amended, denied that the vote of the board of aldermen of December 29, 1885, levying the assessments for the construction of the sewer, was as set forth in the petition, but was as follows: "Assessments on the abutters for the construction of sidewalks, also assessments to defray in part the expense of constructing certain sewers, were levied as follows, and signed by the mayor and aldermen, viz. trunk sewer in Lyman Street, from Race Street to Canal Street, total $6,630.86"; that other persons whose land was similarly situated and derived as much benefit therefrom as that of the petitioner were not assessed; and that persons owning land on Lyman Street, and on the line of the sewer, were not assessed or required to pay for any portion of the expense of the construction of the sewer, but alleged that "all such persons were assessed."

The answer neither admitted nor denied, as a matter not within the knowledge of the respondents, the allegation in the petition that the sewer was built under the supervision and direction of a joint committee, composed of four members of the common council and three aldermen, and declared that, "if the said allegation be true, the validity of the assessment is not affected thereby."

The answer, as amended, alleged that, on December 29, 1885, an order or warrant for the collection of two thirds of the cost of the sewer, as provided by the ordinances of the city, was signed by the mayor and aldermen of that year; that in a list annexed to the same an apportionment of the cost of the sewer was made by the mayor and aldermen to the parties benefited thereby; that the warrant and list were given by the mayor and aldermen to the city treasurer for the collection of such sums; that the assessment of $51.84 upon the petitioner was made in the list annexed to the warrant; that the treasurer duly demanded that sum from the petitioner, who neglected and refused to pay the same; and that in the list the assessments were divided into three classes, which were called direct benefit, remote benefit, and more remote benefit, and that the petitioner was assessed in the third class.

The answer, as amended, then averred, in reply to the particular reasons for quashing the assessment: 1. that it was admitted that the petitioner was not an abutter in the sense

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of being an adjoining owner, but that the validity of the assessment was not thereby affected; 2. that the records of the city showed what was the actual expense of the construction of the sewer, in the order of the board of aldermen of December 29, 1885, and in the warrant of the mayor and aldermen of the same date; 3 and 4. that the superintendent of sewers did keep and submit to the board of aldermen an account of the cost of the construction of the sewer, and did make a report thereof, both of which were informal, and copies thereof could not be annexed, but if the superintendent made no such report, the said assessment would not be rendered invalid thereby; 5. that it was admitted that the superintendent of sewers did not report to the board a list of the persons and estates deriving benefit from the sewer, but the "validity of the assessment is not affected thereby"; 6. that the assessment was made by the board of aldermen, and was legal, as appeared by the above order and warrant of December 29, 1885; 7. that the sewer was constructed by the mayor and aldermen, as required by law, that a demand for the payment of the assessment was duly made upon the petitioner, and that he had sufficient notice that the assessment had been made, notice and demand being sent by mail, properly directed to the petitioner, by the city treasurer, and signed by him, about February 1, 1886, in substance as follows: "City of Holyoke, Treasurer's Office, 1886. George W. Collins. Sir: A tax has been assessed on you by the city of Holyoke, to defray the expense in part of constructing a main drain or common sewer in Lyman Street, from Race Street to Canal Street, of $51.84. You are hereby requested to make immediate payment of the same"; 8. that it was denied that various persons owning land situated and abutting on the line of the sewer, or situated with respect to the sewer similarly to the land of the petitioner, and deriving as much benefit therefrom, had not been assessed or not required to pay for any portion of the cost of the construction of the sewer; 9. that it was denied that the assessment was invalid because of divers other errors, but that the same should have been specifically set forth, if they existed, to require an answer; 10. that the petitioner could not object in this proceeding that he or his estate received no benefit from the sewer, but that if he could so object, his estate did receive such benefit; and 11. that the board of

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aldermen did fix the time when the proportions of the assessments should be paid.

The answer was signed by "James J. O'Connor, William H. Jess, John Dillon, James F. Cleary, W. E. Syms, John Hildreth, Henry Winkler, James W. Toole, Mayor and Aldermen City of Holyoke, Mass.," and the following affidavit was annexed to it: "Commonwealth of Massachusetts. Hampden, ss. August 24, 1887. Personally appeared before me the above-named James J. O'Connor, William H. Jess, John Dillon, James F. Cleary, W. E. Syms, John Hildreth, Henry Winkler, and James W. Toole, who do depose, make oath, and say, that they are the respondents named in the foregoing answers and the amendments thereto subscribed by them, and they know the contents thereof; that those allegations in said answers and amendments which relate to the matters of the records of the board of mayor and aldermen, and to said warrant or order, they know of their own knowledge to be true; that any of them were not members of the board of mayor and aldermen of the year 1885, who made the assessment in question, and they do not know of their own knowledge that the other matters and things stated in said answers and amendments are true, but upon information and belief they believe them to be true. Before me, T. B. O'Donnell, Justice of the Peace."

Hearing before *W. Allen*, J., who reserved the case for the consideration of the full court, upon the petition and answer.

W. H. Brooks, for the petitioner.

T. B. O'Donnell, for the respondents.

KNOWLTON, J. In proceedings to obtain a writ of certiorari the burden is upon the petitioner to establish all the material allegations of his petition. In this case, which was reserved upon the petition and answer, we must hold, in accordance with the decision in *Dickinson* v. *Worcester*, 138 Mass. 555, that the statements in the defendant's official answer are to be taken as true, not only in those parts which set out the record, and the acts of the board within its jurisdiction which do not appear in the record, but also in those which allege extraneous facts which might have been traversed, and perhaps controlled by evidence. The affidavit appended to the petition could not have been received as evidence at a final hearing upon the facts, and cannot affect the rights of the parties upon this reservation.

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The membership of the defendant board is not the same as when the assessment in question was made. But while its members change from time to time, the board itself as a tribunal is continuously the same. In *Fairbanks* v. *Fitchburg*, 132 Mass. 42, the board of mayor and aldermen that made the answer had not the same members as when it passed the order which was alleged to be illegal, but it was held that its right to answer was not thereby affected. In that case it appeared that the members who answered had executed the order which was called in question, and it was assumed that in the performance of that duty they must have known the facts connected with the adoption of the order. But the right of such a tribunal to answer as to its previous doings does not depend upon former action of the members who make the answer in the matter to which the answer relates. It will often happen that the doings of a board acting judicially will be first called in question after they have been completed, and after the membership of the board has entirely changed. In such a case, it is important that the proceedings should be officially set forth. And this can be done only by those who are members when the question arises. Their answer as a board is made over their own signatures, and under the sanction of their official oaths. As public officers they may be expected to act impartially. It may be presumed that, before making such an answer, they will acquire what may be called official knowledge of the acts of their predecessors. As members of the same board, they may in a variety of ways be expected to have opportunities of knowing what the board has done, and how it has done it. Without personal knowledge, they may have official knowledge, which is something better than mere hearsay. And in presenting an answer upon which the conduct of the board is to be passed upon by a higher tribunal, they should be permitted to state facts which they know officially, even though they do not know them personally. The statements in relation to the records of the board, and its doings within its jurisdiction, which appear in the answer in this case, seem to be of this kind. The others are mere allegations in the nature of pleading, which may always be controverted by a petitioner. The form of jurat annexed to the answer does not indicate that those who answered had not official knowledge of the

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acts of the board in regard to which such an answer is ordinarily conclusive. It merely disclaims personal knowledge. But it is unnecessary to decide in this case whether any part of the answer except the record would have been conclusive if traversed by the petitioner, for, in accordance with the decision to which we have referred, all its allegations must be deemed to be true.

Although the proceedings which we are considering were very irregular, the legal questions which arise in the case as presented are comparatively simple. It is true, as contended by the petitioner, that the mayor and aldermen could not delegate the authority given them by the Pub. Sts. c. 50, § 1, to lay and make common sewers. But no suggestion is made that this sewer was not legally laid, and it is only objected that it was "built under the supervision and direction of a committee, composed of four members of the common council and three aldermen." But this was done by order of the mayor and aldermen. The statute which gave them authority to make the sewer did not preclude them from employing agents to supervise and direct the work. If there was any irregularity in their conduct in this respect, we cannot say that the sewer was not "made" by the defendants, or that it was illegally constructed.

The petitioner was not entitled to notice of the defendant's intention to lay out and construct the sewer, or to make an assessment upon him. *Allen* v. *Charlestown*, 111 Mass. 123. *Holt* v. *Somerville*, 127 Mass. 408.

The validity of the assessment made by the mayor and aldermen is not affected by the fact that they called in another person to assist them in making it. *Taber* v. *New Bedford*, 135 Mass. 162.

The provisions of the ordinances requiring the superintendent of sewers to keep and submit to the board an account of the cost of constructing the sewer, and to report a list of the persons deriving benefit from it, were merely directory, and his failure to comply with them did not invalidate the assessment. *Dickinson* v. *Worcester*, 138 Mass. 555.

As a convenient method of equitably adjusting the assessments, the members of the board might, if they saw fit, divide them "into three classes, direct benefit, remote benefit, and more remote benefit."

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After the assessments were made, the petitioner appears to have had notice of the assessment upon him, in accordance with the provision of the Pub. Sts. c. 50, § 4.

The allegations of the answer and the amendments to it cover all the other matters referred to in the petition, and we find that justice does not require that a writ of certiorari should issue.

Petition dismissed.

MARY A. SLATER & others *vs.* CHARLES R. HURLBUT & another.

Worcester. October 6, 1887. — March 3, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Will — Executor — Trust and Trustee.

A testator, after a bequest and devise of land for life to his wife, she to pay for repairs, insurance, and taxes, devised all the residue of his real estate, including the remainder of that given to his wife for life, to his sisters absolutely, requested his executor to insure and repair "all my buildings," and not to sell "any of my real estate" unless upon the sisters' written request "in performance of the duties of the trust," desired him to take commissions "on all the rents," and directed him to collect the rents monthly, to pay all taxes, and to pay over the balance to those entitled thereto. *Held*, that the executor, after distributing the personal estate and after two years from the filing of his bond, was not entitled, against the wishes of the residuary devisees, to continue to manage the real estate and to receive compensation therefor.

PETITION to the judge of probate, by the three sisters of Luther Slater, against his executor and widow, for the construction of the will. The material clauses of the will were the following:

"Item. I devise and bequeath to my beloved wife, Ella S. Slater, the use, income, and improvement of my two dwelling-houses, land, and the appurtenances, situated on the corner of Austin and Temple Streets in that part of Cambridge in said Commonwealth called and known as Cambridgeport. To have and to hold the same to her for and during her natural life. She to keep said dwellings in good repair and insured for a reasonable amount, and to pay all taxes on the same.

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"Item. I give and bequeath to my said wife, Ella S. Slater, one half of all the personal estate which I shall possess at the time of my decease. To have and to hold the same to the said Ella S. Slater, her heirs and assigns, to her and their use and behoof forever.

"Item. I devise and bequeath to my three sisters, N. Catharine Emerson, Elizabeth A. Slater, and Mary A. Slater, the reversion or remainder of said dwelling-houses in Cambridgeport, the land, and the appurtenances, and all profit, income, and advantages that may result therefrom, from and after the decease of my said wife, to them and their use and behoof forever. I also give to my said sisters all the furniture of mine which they may have now in their possession.

"Item. All the rest and residue of my estate, real, personal, or mixed, of which I shall die seised and possessed, or to which I shall be entitled at the time of my decease, I give, devise, and bequeath to my said three sisters, N. Catharine Emerson, Elizabeth A. Slater, and Mary A. Slater, as joint tenants, share and share alike; should either of my sisters die before me, then the surviving sisters shall receive the share of the deceased sister, to be divided equally; in case of the death of two of my sisters before my death, then I direct that the surviving sister shall have and receive the whole of the residue of my estate.

"Item. I do nominate and appoint Charles R. Hurlbut of said Worcester to be the executor of this my last will and testament. I hereby request my said executor to keep all my buildings insured for a reasonable amount, and to keep said buildings in proper repair, and I further request my said executor not to sell any of my real estate unless my sisters or the survivors or survivor of my said sisters shall request in writing such sale to be made, and I hereby authorize and empower my said executor, or whoever shall execute this will, if in the performance of the duties of the trust it becomes necessary or expedient to sell any or all of my real estate, and my said sisters, the survivors or survivor of my said sisters, shall so request in writing, then I give to my said executor, or whoever shall execute this will, power and authority to sell any of my real estate at auction or private sale, and to execute and declare good and sufficient deeds to convey the same.

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"I hereby devise and desire that my said executor shall have and receive a commission of five per cent on all the rents which he shall collect and receive for the use of my real estate, and shall have the use of the house he now occupies free from rent while he shall act as my executor, which said commission of five per cent and the free use of the house he now occupies shall be payment in full as executor of this will, and for all his services as executor.

"I further direct my said executor to collect the rents monthly, to pay all taxes upon my said estate, and to reserve from each monthly payment of rent one twelfth of the amount due for taxes, and to pay the balance of the rents, after deducting his commission of five per cent, to the persons who shall be legally entitled to have and receive the same by this will."

The petition alleged that the executor had distributed and paid over all the personal estate in accordance with the will, except certain bonds and papers that were stolen and never came to his hands; that he had filed his third account showing no assets in his hands; that more than two years had elapsed since his bond was filed; and that the estate had been fully settled, unless by reason of any question arising under the will.

The petition also alleged that the executor claimed the right and duty to continue to act as executor under the will; that his executorship would not expire until the same had been carried out and performed, and the bonds and papers recovered, notwithstanding the distribution of assets; and that he had the right to collect rents and pay taxes, insurance, and repairs upon the house now occupied by him so long as he occupied it, and also taxes, insurance, and repairs upon the real estate devised to the petitioners, and to continue to occupy the house rent free.

The petitioners contended that the executor had performed all the duties imposed upon him by the will, and that he had no right to continue to charge commissions or to have his house rent free, and asked the judge of probate to decree that the trust was terminated, and to hear and determine the following questions arising under the will:

"1. Is the distribution of assets, leaving no balance in the executor's hands, to be considered a final account and termination of his trust, or is said executor, by reason of said requests,

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directions, and power to sell, to continue as such for the purpose of complying therewith? 2. Do said requests, directions, and power impose a trust not terminated by the distribution of the personal estate, or a mere power, the purpose of which was accomplished upon said distribution? If the former, what is the duration of the trust? 3. How long, by the terms of the will, has the executor a right to collect the rents and be paid therefor in free house rent and commissions of five per cent? 4. Has the executor, if said requests, directions, and power impose a trust continuing after said distribution, the right to deduct and pay taxes, repairs, and insurance upon the house occupied by him rent free from the rents of the real estate devised to the residuary devisees? 5. Does any request, direction, or power conferred by the will impose any such trust as longer to necessitate the continuance of an executor? and if so, what is that request, direction, or power? 6. Is it the intent of the testator that all the duties of the executor, and his payment for their performance in commissions and house rent, should cease upon distribution of personal assets? If not, upon the happening of what event or events do they cease?"

The judge of probate made a decree, that no trust was created by the will of Luther Slater which was not terminated upon the distribution of the personal property, and that the duties of the executor ceased when such distribution was made. From this decree the respondents appealed.

The case was heard in this court, before *Gardner*, J., who made a decree that the will created a trust in the executor which was not terminated upon the distribution of the personal property, and that the duties of the executor did not cease when the distribution was made, but would continue during the life of the widow; and reversed the decree of the judge of probate. The petitioners appealed to the full court.

C. A. Merrill, for the petitioners.

W. S. B. Hopkins, for the respondents.

1. This will uses words fully adequate to create a trust and an interest in favor of the executor. "Wish and request," "authorize and empower," "devise and desire," not to add the word "direct" in especial connection with collecting rents, have all been adjudicated apt to create trusts. *Pierson* v. *Garnet*, 2

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Bro. C. C. 38. *Foley* v. *Parry*, 2 Myl. & K. 138, 144. Trusts arise by implication from the provisions of a will, in order to carry out the testator's intention where there is no corpus given to the trustee. *Walker* v. *Whiting*, 23 Pick. 313. *Braman* v. *Stiles*, 2 Pick. 460. *Fay* v. *Taft*, 12 Cush. 448.

2. The evidences in this will of a confidence and duty intrusted to this executor, and that they extend at least over the period of the wife's life, are numerous. The testator expressly directs his executor to collect the rents monthly, to pay the taxes, to deduct one twelfth from the rents to pay taxes and commissions with, and to pay over the balance to those entitled to the same under his will. The testator "requests" the performance of those duties which pertain to the actual charge of the estate; and foreseeing that the trust — for he calls it a "trust" — might last so long that a question of the desirability of selling might arise, he vests the executor with a power to sell. The terms of the power to sell, and the requests connected with it, import that the testator intended to place, and supposed he did place, the executor in a position of long continuing responsibility and management, and are inconsistent with the limitation of the duty to two years or less. The words "in the performance of the duties of the trust it becomes necessary," &c., cannot refer to the ordinary settlement of the personalty and payment of debts. The testator then proceeds to "devise," as well as appoint by the expression of a "desire," that his executor should have a house free and a commission on rents for his compensation, with which ordinary executors have nothing to do. This compensation is to be "in full as executor of this will, and for all his services as executor." Does not this indicate that the testator had imposed two sets of duties, — first, the execution of the will in the regular probate channel, and second, the charge of the real estate, of which the beneficiaries were all women? The determination of the trust, in view of the various provisions of the will, is to take place when the widow dies and the residuary legatees come into possession of the "reversion or remainder" which is devised to them by the third item. Up to that time the management of the whole is in the executor. When no interest remains in any of the testator's realty, except that given to the daughters, viz. the fee, the executor's duties regarding the real estate will terminate.

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C. ALLEN, J. The question in this case is, whether under the terms of the will the executor is entitled, against the wishes of the residuary devisees, to continue in the management and care of the real estate left by the testator, and to receive the compensation provided in the will for such service.

So far as the personal estate of the testator is concerned, the executor has performed his duties and discharged his trust; unless hereafter the stolen bonds or some of them shall be recovered. There is nothing to show any probability of his receiving anything from this source. Two years have expired since the filing of his bond, and full distribution has been made of all the personal property in his hands. It is not contended in argument that the fact of the outstanding bonds furnishes any reason for his continuing in the care of the real estate.

The real estate of the testator was disposed of in this manner: certain of it was given to his wife, for her life, and all the residue, including the remainder of that given to his wife for life, to his sisters. There was a provision that his wife should keep the dwellings upon the land devised to her for life in good repair and insured, and should pay all taxes on the same. But the executor contends that the later provisions of the will have the effect by implication to vest in him an estate in trust in the whole or a part of the real estate, by conferring powers and imposing duties in respect to the same which cannot otherwise be properly executed and performed. *Fay* v. *Taft*, 12 Cush. 448.

In respect to the estate devised to the testator's wife for life, it is not to be supposed that he intended that the executor should exercise the powers and duties which are mentioned, because, in the first place, the testator imposes on her the duty of paying for repairs, insurance, and taxes, and gives to her certain personal property wherewith she may be able to do it; and, moreover, the executor would have no means with which to pay these expenses except from the residuary estate, unless it could be supposed that the testator meant that his wife should furnish to the executor the money for these purposes. Besides, the testator authorizes the executor, upon the request in writing of his sisters, under certain circumstances, to sell the real estate; and if he intended to include in this authority the land given to his wife for life, it would seem probable that he would have required

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her eminent aim. It must be considered that the testator did not intend to give his executor authority over the estates devised to his wife for life, although in terms the language includes all of his real estate. This conclusion is more easily reached, because the whole will shows a considerable want of accuracy in the use of language.

In respect to the residuary estate devised to the testator's sisters, the question is certainly far from clear, and it must be conceded that it is not easy to account for the various provisions by assuming that the testator inserted them merely in order that his executor should have the charge and management of the estates during the time required for the discharge of the ordinary duties of an executor. They seem to be more extensive and permanent than would naturally be expected for such a limited purpose. But, on the other hand, various considerations lead to the contrary inference. There is no express devise to him in trust: the devises to the testator's sisters are absolute and unqualified in their terms; their ages are not given, but at any rate it is assumed that at present they are all of age and *sui juris*; the will discloses no reason for the creation or permanent continuance of a trust in respect to their estates, unless for the purpose of benefiting the executor; there is no language necessarily implying that the executor was to perform duties or exercise powers which implied the vesting of a trust estate in him; he was not to sell the property unless by the written request of testator's sisters: the other provisions were mostly in the of requests to the executor, and are susceptible of the tion that the testator was seeking to furnish assista sisters in the care and management of the property should need it: the final direction to collect rents may have been on the assumption that this sho assistance should be needed, and not other whole, and especially in view of the absol earlier provisions wherein the residue is giv ters without qualification, we do not find a clear intent to cut down the estates them to a trust.

Moreover, even assuming that that the trustee would take no

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for the proper execution of the trust. *Fay* v. *Taft*, *ubi supra*. The whole beneficial interest in this portion of the estate being vested in the testator's sisters, no other person has an interest to maintain or continue the trust, unless the trustee himself, and a decree for the termination of the trust might properly be entered.* We have not been referred to any case where a trust has been continued merely for the purpose of continuing the compensation of the trustee, and we should be slow to do this unless such clearly was the intention of the founder of the trust. We find no such intention in the present case.

The result is, that, in the opinion of a majority of the court, the decree appealed from must be reversed, and the decree of the judge of probate affirmed. *Decree accordingly.*

CHARLE nother *vs.* MERCHANTS AND MINERS' ORTATION COMPANY.

mber 10, 1887. — March 3, 1888.

Pre ELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Bill of Lading ract — *Breach.*

under a bill containing instructions to its route "to " of the consignor "or his and direct ing a place beyond as their ho, without instructions, forwards them carriers, whom delivers them up to the him to p ill of lading, commits a breach r the val ds.

er the rtain goods, with a count ion o alleged to be for the same in t Court, before *Pitman*, J., stance as follows:

on August 2, 1884, to the between Boston and Nor-

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her consent also. It must be considered that the testator did not intend to give his executor authority over the estates devised to his wife for life, although in terms the language includes all of his real estate. This conclusion is more easily reached, because the whole will shows a considerable want of accuracy in the use of language.

In respect to the residuary estate devised to the testator's sisters, the question is certainly far from clear, and it must be conceded that it is not easy to account for the various provisions by assuming that the testator inserted them merely in order that his executor should have the charge and management of the estates during the time required for the discharge of the ordinary duties of an executor. They seem to be more extensive and permanent than would naturally be expected for such a limited purpose. But, on the other hand, various considerations lead to the contrary inference. There is no express devise to him in trust; the devises to the testator's sisters are absolute and unqualified in their terms; their ages are not given, but at any rate it is assumed that at present they are all of age and *sui juris*; the will discloses no reason for the creation or permanent continuance of a trust in respect to their estates, unless for the purpose of benefiting the executor; there is no language necessarily implying that the executor was to perform duties or exercise powers which implied the vesting of a trust estate in him; he was not to sell the property unless by the written request of the testator's sisters; the other provisions were mostly in the nature of requests to the executor, and are susceptible of the construction that the testator was seeking to furnish assistance to his sisters in the care and management of the property in case they should need it; the final direction to collect rents and pay taxes may have been on the assumption that this should be done if his assistance should be needed, and not otherwise; and on the whole, and especially in view of the absolute character of the earlier provisions wherein the residue is given to the testator's sisters without qualification, we do not find in the later provisions a clear intent to cut down the estates so devised by subjecting them to a trust.

Moreover, even assuming that a trust was created, it is plain that the trustee would take no larger estate than was necessary

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for the proper execution of the trust. *Fay* v. *Taft*, *ubi supra*. The whole beneficial interest in this portion of the estate being vested in the testator's sisters, no other person has an interest to maintain or continue the trust, unless the trustee himself, and a decree for the termination of the trust might properly be entered.* We have not been referred to any case where a trust has been continued merely for the purpose of continuing the compensation of the trustee, and we should be slow to do this unless such clearly was the intention of the founder of the trust. We find no such intention in the present case.

The result is, that, in the opinion of a majority of the court, the decree appealed from must be reversed, and the decree of the judge of probate affirmed. *Decree accordingly.*

CHARLES H. NORTH & another *vs.* MERCHANTS AND MINERS' TRANSPORTATION COMPANY.

Suffolk. November 10, 1887. — March 3, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Common Carrier — Bill of Lading — Contract — Breach.

A carrier, who receives goods under a bill of lading containing instructions to deliver them at the end of its route "to the order" of the consignor "or his assigns," as well as marks and directions indicating a place beyond as their ultimate destination, and who, without giving like instructions, forwards them to that place by intermediate carriers, the last of whom delivers them up to the consignee without requiring him to produce the bill of lading, commits a breach of contract, and is liable for the value of the goods.

CONTRACT to recover the value of certain goods, with a count in tort, for the conversion of the same, alleged to be for the same cause of action. Trial in the Superior Court, before *Pitman*, J., who allowed a bill of exceptions in substance as follows:

The plaintiffs delivered the goods on August 2, 1884, to the defendant, a common carrier by water between Boston and Nor-

* See Sears v. Choate, *post*, p. 395.

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folk, Virginia, and took from it a bill of lading, which recited the reception of the goods, and stated that they were to be transported "to the wharf of the above-mentioned company at N., and there to be delivered to the order of Chas. H. North & Co., or his assigns, if called for by him or them, as in this contract provided, he or they paying freight and charges thereon, and average, if any."

In the margin of the bill of lading, under the printed words "Marks and Numbers," were written the following:

"

Windsor, N. C.,
Care Agent, Portsmouth, Va."

Across the face of the bill of lading the following words were written: "Notify M. E. Skirven, Windsor, N. C."

From Norfolk the usual and only practicable route for merchandise destined for Windsor, North Carolina, was by Lawson's Express from the wharf of the defendant at Norfolk to the Seaboard Railroad, at Portsmouth, Virginia, thence to Plymouth, North Carolina, and thence by steamer on the river Cashia to Windsor, these several connecting lines being independent of each other. The goods arrived and were landed on the wharf of the defendant at Norfolk, on or about August 4, 1884, and were then delivered by it to Lawson's Express, with the following instructions only, as contained in his receipt:

"For $\begin{matrix}\text{order}\\\text{notify}\end{matrix}$ M. E. Skirven, Windsor, N. C."

Lawson's Express delivered the goods to the Seaboard Railroad, and gave to it the same instructions. The defendant collected its charge for carrying the goods of Lawson's Express, which collected that sum and its own charge in addition, of the Seaboard Railroad, on delivery of the goods. The goods arrived safely at Windsor, and were there delivered to Skirven by the last carrier in the line, without requiring him to produce the bill of lading. On or about August 2, 1884, the plaintiffs indorsed the bill of lading in blank, and sent it, attached to the receipted bill for the goods, by the Adams Express Company to Windsor, directing it to present the bill to Skirven for payment, and, upon receiving payment thereof, to deliver to him the receipted bill and the bill of lading. Subsequently, the Adams Express Company returned the receipted bill and the bill of lading to the

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plaintiffs, and informed them that they had presented the bill to Skirven, who had refused to pay it.

The agent of the defendant, who had charge of its business in Boston, testified *de bene*, under objection, that the defendant had been engaged for many years in carrying merchandise from Boston to Norfolk, including merchandise marked for points beyond Norfolk; that it was the general custom of the defendant line, and of other steamship lines and railroad companies in Boston and New York, when they received merchandise for transportation marked for points beyond the ends of their lines, to forward the same from the end of their lines by connecting lines to its destination, in all cases where bills of lading or receipts were issued similar to the one in question; but that, so far as he knew, the plaintiffs had no knowledge of this custom.

The evidence for the plaintiffs was, that they had no such knowledge; that this was the only order ever received from Skirven, and that their understanding of the contract was that the goods were to be held at Norfolk until Skirven paid for them, and presented the bill of lading to the defendant, properly indorsed.

The defendant requested the judge to instruct the jury that the duty of the defendant was only to transport the goods to Norfolk as a common carrier, and to forward them from that point to Windsor, North Carolina; that if the defendant delivered the goods to the connecting carrier at Norfolk, in good order and condition, with proper instructions in regard to forwarding and delivering the same, it was not liable to the plaintiffs in this action; and that upon the evidence the plaintiffs were not entitled to recover. But the judge refused so to instruct the jury, and instructed them that, upon the evidence, the plaintiffs were entitled to a verdict as a matter of law. The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

R. Stone, for the defendant. The law is well settled in this Commonwealth, that a corporation established for the transportation of goods for hire between certain points, and receiving goods directed to a more distant place, is not responsible beyond the end of its own line as a common carrier, but only as a forwarder, unless it makes a positive agreement extending its liability. *Nutting* v. *Connecticut Railroad*, 1 Gray, 502. *Judson* v.

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Western Railroad, 4 Allen, 520. *Darling* v. *Boston & Worcester Railroad*, 11 Allen, 295. *Burroughs* v. *Norwich & Worcester Railroad*, 100 Mass. 26. *Washburn* v. *Providence & Worcester Railroad*, 113 Mass. 490. And the same rule is adopted in most of the States. *Myrick* v. *Michigan Central Railroad*, 107 U. S. 102. The case of *Simkins* v. *Norwich & New London Steamboat Co.* 11 Cush. 102, was similar to the present case.

The purchaser, having got possession of the goods, refused to pay for them, and the plaintiffs now seek to collect the bill of the defendant, upon the theory that the defendant violated the contract in forwarding the goods beyond Norfolk, and that it should have retained possession of them there until the bill of lading was presented to it properly indorsed. The presiding judge at the time seems to have been led to adopt this construction by the words in the bill of lading, "there to be delivered." In so doing he failed to give due weight to the marks on the goods, and to the direction to "Notify M. E. Skirven, Windsor, N. C.," both of which were in writing, while the words just quoted were printed in the blank bill of lading. If there is any repugnancy between the two, the printed should yield to the written words. A delivery of goods to a carrier for transportation, marked and directed to a distant place, has been held to show that the goods were intended to be transported to that place. *Darling* v. *Boston & Worcester Railroad*, 11 Allen, 295, and cases *ubi supra*. Why inform the carrier that the goods are to be transported to Windsor, North Carolina, if the carriage is to end at Norfolk? Why mark the goods, "Care Agent, Portsmouth, Va.," unless the carrier is to forward them by way of Portsmouth?

W. H. H. Emmons, for the plaintiffs.

FIELD, J. The contract of the defendant was to transport the goods by steamship from Boston to its wharf at Norfolk, Virginia, and there deliver them to the order of the plaintiffs, if they were called for by them, and if they paid the freight and charges thereon. The marks on the margin of the bill of lading of "Windsor, N. C., Care Agent, Portsmouth, Va.," as well as the directions written across the bill to "Notify M. E. Skirven, Windsor, N. C.," indicated the intention of the plaintiffs that the goods were to be sent from Norfolk to Windsor; but they

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did not indicate that the goods were to be delivered at Windsor to any person who did not have an order from the plaintiffs to receive them. The defendant made no contract to forward the goods beyond Norfolk, unless such a contract is to be implied from these marks and directions. As the contract is express that the goods shall be delivered at Norfolk to the order of the plaintiffs, a contract on the part of the defendant to forward the goods beyond Norfolk cannot be implied from marks and directions which indicate that Windsor was intended by the plaintiffs to be the ultimate destination of the goods. But if these marks and directions could be held to give authority to the defendant to send the goods forward by the usual route to Windsor, and if the defendant undertook to do this, it should have forwarded them with proper instructions. Although Skirven was to be notified of the arrival of the goods, yet it is plain from the contract of the defendant that the goods were ultimately to be delivered to the plaintiffs or their order, and the neglect of the defendant to give this instruction to the carrier to whom it delivered the goods at Norfolk for transportation to Windsor, was a breach of the duty which it assumed when it forwarded the goods. The plaintiffs have lost the value of the goods by the breach of the contract, or of this duty, by the defendant.

We infer from the exceptions that the facts therein recited were undisputed; if so, the instructions were correct. *Northern Railroad* v. *Fitchburg Railroad*, 6 Allen, 254. *Claflin* v. *Boston & Lowell Railroad*, 7 Allen, 341. *Darling* v. *Boston & Worcester Railroad*, 11 Allen, 295. *Hall* v. *Boston & Worcester Railroad*, 14 Allen, 439. *Libby* v. *Ingalls*, 124 Mass. 503. *Forbes* v. *Boston & Lowell Railroad*, 133 Mass. 154. *Johnson* v. *New York Central Railroad*, 33 N. Y. 610. *Little Miami Railroad* v. *Washburn*, 22 Ohio St. 324. *Exceptions overruled.*

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D. MARIA PARKER & another *vs.* JOHN M. G. PARKER.

Middlesex. January 10, 1888. — March 3, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Deposition — Variance — Evidence — Waiver.

If a deposition purporting to be that of E. T. S., and taken upon interrogatories addressed to E. S. S., is offered in evidence at a trial, the testimony of the writer of the interrogatories, that he intended the middle S for a T, is inadmissible on the question whether the adverse party was misled.

The failure to exclude the deposition at a former trial because of the discrepancy, is a waiver of the objection, although counsel did not then notice it.

APPEAL by John M. G. Parker from a decree of the Probate Court appointing guardians for him as an insane person.

Trial in this court, upon issues submitted to a jury before *Knowlton*, J., who allowed a bill of exceptions, which so far as material was as follows:

The deposition of one E. T. Shepard, a medical expert in insanity, was offered in evidence for the appellant, to show that the appellant was sane and capable of taking care of himself. The judge ruled that the deposition was inadmissible, on the ground that in the interrogatories filed, and in the commission issued by the clerk of the court to take such deposition, the name was written "E. S. Shepard." The appellant then offered to show by the testimony of James H. Carmichael, in whose handwriting the interrogatories were, that the middle initial of Shepard's name, as written in the interrogatories, was made for a T and not an S, and that it was his habit to write T in that form; but the judge excluded this evidence.

The appellant then offered to show that the same deposition was offered in evidence, and read to the jury by the appellant's counsel, without objection, at the former trial of this case in this court; and contended that, if there was any valid objection to the admissibility of the deposition by reason of any supposed discrepancy in the middle initial of the name of Shepard, such objection should have been made when the deposition was first offered in evidence; and that, as the appellees had not so objected, they must be held to have waived such objection. The

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statement by one of the appellees' counsel, that he had not noticed the supposed discrepancy in the name at the former trial, was not controverted by the appellant. The judge ruled that the objection had not been waived, and excluded the evidence.

The jury returned a verdict that the appellant was insane; and the appellant alleged exceptions.

C. H. Conant, for the appellant.

E. M. Johnson, (*P. Webster* with him,) for the appellees.

KNOWLTON, J. The only exception argued in this case relates to the exclusion of a deposition offered by the appellant. The deposition taken was that of Dr. E. T. Shepard, of New Orleans, but the interrogatories and cross-interrogatories were addressed to "E. S. Shepard," and the commissioner was directed to take the deposition of "E. S. Shepard." In this Commonwealth a middle name or initial is held to be a part of the name of a person, and cannot be disregarded. *Commonwealth* v. *Shearman*, 11 Cush. 546. *Terry* v. *Sisson*, 125 Mass. 560. The name E. T. Shepard imported a different person from E. S. Shepard. *Commonwealth* v. *Buckley*, 145 Mass. 181. The deposition was therefore on its face inadmissible.

But the appellant might show by any competent evidence that E. T. Shepard was the person whose deposition was intended to be taken, and that the appellees were not misled by the name used in the direct interrogatories, and that they intended to interrogate E. T. Shepard in their cross-interrogatories. Such facts may often be found by the presiding judge upon slight evidence, and this is sometimes contained in whole or in part in the papers themselves; but mere opinions of witnesses cannot be received to establish them. And in the case at bar, testimony of the intention of the witness Carmichael, when he wrote the name in the direct interrogatories, to make a T when in fact he made an S, was not competent upon the question whether the appellees were misled by the name as he wrote it. For they had no means of knowing who was meant, or what he intended, except from what appeared on the paper.

Without considering more particularly the other questions in the case, we must sustain these exceptions, on account of error in the ruling in relation to the use of the deposition at the

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former trial. The appellant offered to show that at that time it was read without objection, and contended that the appellees, by their conduct then, had waived their right to make objection afterward. It was proved and admitted that the appellees' counsel did not discover the discrepancy in names until after the trial, and thereupon the court ruled that there was no waiver, and that the evidence was immaterial.

It is a general rule, that one cannot be held to waive that of which he has no knowledge; but there are cases in which one's action is important as affecting the situation or conduct of another, when it is his duty to ascertain facts, and act promptly if he desires to avail himself of his legal rights. In such a case, by failure to act he may waive a right of whose existence he is ignorant.

It was decided in *Gould* v. *Hawkes*, 1 Allen, 170, that a party who permitted depositions to be read without objection at a hearing before an auditor thereby waived his right to object to them afterward on account of formal defects at the trial. It is said in the opinion, that "fairness of dealing required that the plaintiff should object to the depositions as soon as they were offered in evidence, if he then was aware of a cause for objection; and if he did not discover the alleged defect in them until after the hearing before the auditor, it was an oversight which cannot be allowed to injure the defendant." The case at bar is within this decision. *Exceptions sustained.*

HANNAH SULLIVAN *vs.* CORNELIUS O'LEARY.

Suffolk. January 16, 1888. — March 3, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Evidence — Cross-examination — Slander.

A party sued for slander, who denies the charge, cannot be asked on cross-examination if he had not slandered another person two or three years before.

TORT for slander in publicly accusing the plaintiff of being a prostitute.

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At the trial in the Superior Court, before *Bacon*, J., the plaintiff was permitted, on cross-examination, to ask the defendant, who had denied that he uttered the words complained of, if another besides the plaintiff had not made complaints against him for abusive language, if two or three years before one McCann had not sued him for foul language about his wife, and if he had not paid McCann fifty dollars to settle that suit, to all of which the defendant replied in the affirmative.

The jury returned a verdict for the plaintiff for $642.24; and the defendant alleged exceptions.

I. R. Clark, for the defendant.

T. J. Gargan, for the plaintiff.

KNOWLTON, J. Upon the question whether the defendant had uttered slanderous words in relation to the plaintiff, evidence was permitted to be introduced tending to show that he had slandered another person two or three years before. This was contrary to the well established rule of the common law, that one cannot be proved to be guilty of an offence for which he is on trial by showing that at another time he committed a similar offence. *Jordan* v. *Osgood*, 109 Mass. 457. *Commonwealth* v. *Jackson*, 132 Mass. 16. If the testimony be considered in reference to contradiction of the defendant, it comes within the same rule, for it had no tendency to disprove his denial of the charge in the present case.

The discretion exercised in regard to cross-examination should not ordinarily go so far as to permit the introduction of evidence which has no legitimate relation to any of the issues on trial, and which is at the same time of such a character as to be likely to be applied to them by the jury, and improperly to affect the verdict. *Smith* v. *Castles*, 1 Gray, 108. *Holbrook* v. *Dow*, 12 Gray, 357. The evidence excepted to in this case may have led the jury to believe that the defendant was accustomed to slander people, and that he probably slandered the plaintiff. *Exceptions sustained.*

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WILLIAM PRAY *vs.* EMMA WASDELL & others.

Middlesex. January 18, 1888. — March 3, 1888.

Present: MORTON, C. J., DEVENS, HOLMES, & KNOWLTON, JJ.

Landlord and Tenant — Forcible Entry and Detainer — Appeal — Bond — Judgment — Waiver — Rent — Damages.

A bond, given on an appeal under the Pub. Sts. c. 175, § 6, in an action to recover possession of a room, and conditioned that the tenant "shall enter and prosecute his said appeal" in the Superior Court "with effect, and satisfy any judgment which may be entered against him in said Superior Court, and all rent due or to become due, damages and costs, upon said appeal and for costs, within thirty days of the entry of such judgment," if not within the statute, is valid at common law.

If the bond provides for the entry of the appeal on the "first Monday of September next," and, although it is dated August 13 and recites proceedings as having occurred on August 16, is not filed and approved until September 1, which is Monday, that is the day for such entry, and the date of the bond, not being misleading, will not affect its validity.

If the tenant when notified to quit merely exchanges rooms in the same house with another person, the jury may, in an action on the bond, regard the latter's occupation as that of the tenant.

A misdescription in a writ on the Pub. Sts. c. 175, of the street on which the premises sought to be recovered are situated, is not fatal, if the description otherwise is sufficient.

In an action on the bond it is too late to impeach the validity of the judgment obtained without objection on appeal, on the ground that the bond differs from that prescribed by statute.

A lessee of premises for one year from June, 1884, brought an action in July, 1884, on the Pub. Sts. c. 175, to recover possession of a room from a sub-lessee, and in June, 1885, took a new lease for a further like term. The sub-lessee, on appeal from a judgment against him, gave a bond, in September, 1884, conditioned to pay all "rent due or to become due," and, on affirmance of the judgment, possession was taken on execution in March, 1886. *Held*, in an action on the bond brought in April, 1886, that rent was recoverable under the new, as well as under the original lease.

CONTRACT on a bond, bearing date August 13, 1884, to the plaintiff, by the defendant Charles Stebbins as principal, and by the other defendants as sureties, filed and approved on September 1, 1884, and containing the following condition:

"The condition of this obligation is such that whereas the said William Pray, by the consideration of the justice of the First District Court of Eastern Middlesex holden at Malden within

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the County of Middlesex for civil business on the sixteenth day of August in the year of our Lord one thousand eight hundred and eighty-four, recovered judgment against the said Charles Stebbins for the possession of certain premises set forth in the below action, and costs of suit taxed at eleven dollars and twelve cents in a personal action brought by said William Pray against said Charles Stebbins, in which said action William Pray claims the premises described in his said writ, from which judgment the said Charles Stebbins appealed to the Superior Court to be holden at Lowell within and for the County of Middlesex for the transaction of civil business on the first Monday of September next. Now if the said Charles Stebbins shall enter and prosecute his said appeal at said Superior Court with effect, and satisfy any judgment which may be entered against him in said Superior Court, and all rent due or to become due, damages, and costs upon said appeal, and for costs within thirty days of the entry of such judgment then this obligation to be void, otherwise to abide in full force, power, and virtue."

Writ dated April 3, 1886.

The declaration alleged that judgment was rendered in the Superior Court, on appeal, against Stebbins, for the possession of the premises described in the writ in the original action, and for costs, and that the present action was brought to recover the rent, damages, and costs referred to in the bond. The answers severally filed by the defendants admitted the execution of the bond, but denied that the bond or the judgment in the Superior Court was valid; and an additional answer, filed by the defendants, averred that said Stebbins had paid the costs in full, that no rent was due or had ever become due to the plaintiff, and that no damages had been sustained by him.

At the trial in the Superior Court, before *Thompson*, J., it appeared that the writ in the original action, on the Pub. Sts. c. 175, which was dated July 10, 1884, alleged that Stebbins was in possession of "a room situated on the northeast corner of house on Vine Street," in Melrose, but described the house as standing on land bounding on Myrtle Street; that execution duly issued on the judgment in the Superior Court, by which, on March 16, 1886, possession was taken by an officer, to whom the costs were paid in full after the beginning of the

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present action; that a lease of premises on Myrtle Street in Melrose was made to the plaintiff on June 27, 1884, for the term of one year; that a notice to quit, dated on that day, was served the same day on Stebbins; that within forty-eight hours after the date and service of the notice Stebbins vacated the room, having exchanged it for another room in the same house, under an arrangement whereby possession of the room left by him was taken by his mother, who continued to occupy it until March 16, 1886; and that a second lease of the premises on Myrtle Street was made to the plaintiff, dated June 22, 1885, for a further term of one year from June 27, 1885, but it did not appear that Stebbins had any notice of the execution of the second lease.

The defendants asked the judge to rule that the plaintiff could not maintain his action against the defendants on the bond: 1. Because the bond in suit was not a proper bond, or one required by the statute, and was invalid, in that it appeared that it was dated August 13, 1884, was approved September 1, 1884, which was the first Monday of September, 1884, and was conditioned to appear on the first Monday of September next, at the Superior Court; that it included all the costs of both courts, and not of the court appealed to; and that it was in the alternative "for all rent due or to become due, damages, and costs," and not as provided by the Pub. Sts. c. 175, § 6. 2. Because the evidence showed that, Charles Stebbins having paid the entire costs demanded of him, there was nothing due the plaintiff on the bond for costs, and there was nothing due for rent, as it was uncertain what rent the bond referred to, not being in accordance with the terms of the statute. 3. Because the original writ was defective and was of no force, in not describing the premises or any part of the premises mentioned in the lease, not being on Vine, but on Myrtle Street.

The judge declined so to rule, but ruled that the bond was good and valid in law; that the date, August 13, 1884, did not render it invalid; that the appeal to the next Superior Court meant the court held on the first Monday of September, 1884, and was rightfully entered on that date, September 1, 1884; that the plaintiff could recover for damages only, and not the costs of court, and that the damages which could be recovered

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would be the rent due under the first lease until June 27, 1885, and under the new lease from that date until possession was taken under the execution; that the description of the premises as on Vine Street was not fatal, if the description was sufficient clearly to describe the premises; and that if Stebbins exchanged the room he occupied with another person, and, being notified to quit, put such person in possession thereof, that would not be a vacating of the premises in accordance with such notice, and that the occupation by such person under him upon such an agreement might be regarded by the jury as his occupation.

The jury returned a verdict for the plaintiff; and the defend ants alleged exceptions.

A. V. Lynde, for the defendants.

W. Schofield, for the plaintiff.

KNOWLTON, J. The defendants do not contend, and we think they could not successfully contend, that the security to be furnished upon an appeal under the Pub. Sts. c. 175, § 6, in a suit to recover possession of land should be by recognizance, and not by bond. See *Granger* v. *Parker*, 142 Mass. 186; St. 1882, c. 95.

The condition of the bond in this case differs in its language from that called for by the statute. A defendant, upon taking an appeal in a case of this kind, should bind himself "to enter the action, and to pay to the plaintiff if the final judgment is in his favor all rent then due, all intervening rent, and all damage and loss which he may sustain by reason of the withholding of the possession of the demanded premises, and by reason of any injury done thereto during such withholding, together with all costs until the delivery of the possession thereof to him." Pub. Sts. c. 175, § 6. The condition of this bond is to "enter and prosecute his said appeal at said Superior Court with effect, and satisfy any judgment which may be entered against him in said Superior Court, and all rent due or to become due, damages, and costs upon said appeal, and for costs within thirty days of the entry of such judgment."

If this were not a bond, but a recognizance, which would be void for want of jurisdiction in the magistrate if it purported to secure performance of more than the recognizor could lawfully be required to do, we should hesitate to declare it invalid by

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reason of its departure from the language of the statute. A change of form not affecting the substance of the condition would not render it so. *Martin* v. *Campbell*, 120 Mass. 126. Nor a failure to include in the statement of the obligation all that the statute prescribes. *Shaw* v. *McIntier*, 5 Allen, 423. And it is difficult to see what greater obligation as to rent, damages, or costs is stated in the bond, than is described in the statute which we have quoted.

But it is unnecessary to decide whether the contract is valid under the statutes, for, if not, it is binding at common law. It was entered into voluntarily, it contains nothing in conflict with the statute, and it is not otherwise illegal. Obligors who sign such an instrument are bound by it. *Morse* v. *Hodsdon*, 5 Mass. 314. *Sweetser* v. *Hay*, 2 Gray, 49. *Bank of Brighton* v. *Smith*, 5 Allen, 413. *Conant* v. *Newton*, 126 Mass. 105.

The date of the bond does not affect its validity. The paper upon its face shows an error in date; for it is dated August 18, and it recites proceedings in court as having occurred August 16. But it took effect when it was filed and approved, and the mistake created no ambiguity, and was not misleading. *Battles* v. *Fobes*, 21 Pick. 239. *Shaughnessey* v. *Lewis*, 130 Mass. 355.

The presiding judge correctly ruled, that, if the mother of the defendant in the original suit occupied the premises described in the writ under an arrangement with him that she should have them in exchange for other premises which she gave up to him, that might be regarded by the jury as his occupation. The ruling as to the description of the premises was also correct.

Neither the principal defendant nor his sureties, after having given this bond as a means of obtaining an appeal which has been prosecuted to final judgment without objection, can now be permitted to dispute the validity of that judgment on account of the difference which appears between the language of the bond and that prescribed by the statute. *Fall River* v. *Riley*, 140 Mass. 488. *Granger* v. *Parker*, 142 Mass. 186.

The only remaining question is whether the plaintiff was entitled to rent after the expiration of his first lease, while his title and right of possession continued under a second lease which took effect from the expiration of the first. It does not appear how this could have affected the rights of either party at the

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trial of the question of liability; for upon showing a breach of the bond in any particular, the verdict and judgment should have been for the penal sum named in it, and the amount for which execution was to be awarded should have been ascertained in a subsequent proceeding. Pub. Sts. c. 171, §§ 9, 10.

In determining that, the rental value of the premises was to be considered up to the time when the plaintiff obtained possession under his execution. It is unnecessary to determine what would have been the effect as to judgment and execution in the original suit if the plaintiff had not taken his second lease, and if the expiration of the first had been pleaded while the suit was pending. His right to recover when he commenced his action was established, and that entitled him to judgment and execution. In the absence of anything to show a change, his right continued under the new lease, and judgment and execution followed. A fair construction of the language of the bond, "all rent due and to become due," includes rent during the term of the second lease, as well as of the first.

Exceptions overruled.

JOHN W. CORCORAN & another, assignees, *vs.* F. M. WHITE.

Suffolk. January 25, 1888. — March 3, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Replevin — Pleading — Parties to Action — Joinder.

A joint owner of a chattel cannot maintain replevin without joining his co-owners.

REPLEVIN of three horses by the plaintiffs, as the assignees in insolvency of George W. Davis.

At the trial in the Superior Court, before *Bacon*, J., Davis testified that the horses were bought by his order, in May or June, 1886, and were boarded at the stable of the defendant, who was a stable-keeper. They were then sold and taken from the stable of the defendant, and afterwards they were repurchased through one Bridges, who brought them back to the stable

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of the defendant. On cross-examination, he testified that he furnished the money and Bridges transacted the business; that Bridges and himself shared both profits and losses; and that Bridges had no salary or fixed commission, though he denied that there was any partnership between them.

The judge instructed the jury: "The plaintiffs must show that they are either the owners, or part owners, of the property replevied. If you find that the assignees were entitled to the possession of the property by being owners or part owners, they are entitled to the verdict in their favor. If Davis was not owner or part owner, the plaintiffs cannot maintain their action. If the defendant had no title to the property, a part owner would be entitled to maintain replevin. Whether Bridges was a part owner or not in the property has nothing to do with the case, if you find Davis was a part owner. The title of Davis passes to his assignees in insolvency."

The jury found for the plaintiffs; and the defendant alleged exceptions.

E. B. Callender & L. G. Girardin, for the defendant.

S. J. Thomas, for the plaintiffs.

KNOWLTON, J. At the trial the plaintiffs rested their claim to the replevied horses solely upon their title and right of possession as assignees in insolvency of George W. Davis. There was evidence tending to show that one Bridges was a part owner of the horses, but the jury were instructed in effect that it was immaterial whether Bridges was or was not a joint owner with the plaintiffs, and that if the plaintiffs showed that they were owners or part owners of the property replevied they could recover.

In the recent case of *Fay* v. *Duggan*, 135 Mass. 242, it was held, upon a review of the authorities, that one of two or more joint owners of a chattel cannot maintain replevin for it without joining the other part owners as plaintiffs. That case is decisive of the one at bar. *Exceptions sustained.*

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JOSEPH WEHRLE *vs.* SILAS GURNEY.

Suffolk. January 20, 1888. — March 2, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Bail — Scire Facias — Notice — Officer's Return — Statute — Evidence.

Scire facias lies against bail under the Pub. Sts. c. 163, § 7, immediately upon a return of *non est inventus* on the notice issuable upon an application for an arrest on execution under the Pub. Sts. c. 162, § 19, without waiting for the return day of the execution.

An officer's return on such a notice, that after "diligent search" he could not find the judgment debtor "or any last and usual place of abode, tenant, agent, or attorney of his," and could make no service upon him, is sufficient, and is admissible in evidence on the *scire facias*, the words "tenant, agent, or attorney" being immaterial.

SCIRE FACIAS against a surety on a bail bond. Writ dated November 12, 1886. At the trial in the Superior Court, before *Pitman*, J., without a jury, the following facts appeared:

The plaintiff brought an action against one Mapleson, who, upon his arrest on mesne process, on January 16, 1886, gave the bail bond as principal, with the defendant as surety. Judgment was obtained against Mapleson in that action, in which he appeared by attorney on November 1, 1886, and an execution issued on November 5, 1886, upon which there was no return. On November 8, 1886, a notice under the Pub. Sts. c. 162, § 19, returnable on November 12, 1886, at eleven o'clock, A. M., was duly issued by a magistrate, to whom the execution had been presented, and was placed for service in the hands of an officer, whose return upon the notice was as follows: "I have made diligent search for the within-named judgment debtor, but was unable to find him or any last and usual place of abode, tenant, agent, or attorney of his, within my precinct, and could make no service of citation upon him. Thos. Fee, Jr., Deputy Sheriff." This return was offered in evidence by the plaintiff, and admitted under objection.

The defendant requested the judge to rule that the action had been prematurely brought, and could not be maintained on the facts as matter of law. The judge refused so to rule, but ruled

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that the action had not been prematurely brought, and found for the plaintiff; and the defendant alleged exceptions.

G. M. Hobbs, (*E. Avery* with him,) for the defendant.

G. L. Huntress, (*H. Albers* with him,) for the plaintiff.

KNOWLTON, J. It is provided in the Pub. Sts. c. 163, § 7, in relation to suits upon bail bonds, that "in case of the avoidance of the principal and a return on the execution that he is not found, or a return on the notice mentioned in section nineteen of chapter one hundred and sixty-two, that after diligent search by the officer serving the notice the principal is not found, his bail shall be obliged to satisfy the judgment," &c. The defendant contends that, after such a return on the notice, suit cannot be brought on a bail bond until the expiration of sixty days from the date of the execution. But no foundation for his contention is found in the language of the statute, or in the history of the legislation from which it is compiled.

The first alternative named in the section, "the avoidance of the principal and a return on the execution that he is not found," cannot occur until the expiration of sixty days from the date of the execution, for until then the execution is not returnable. *Niles* v. *Field*, 2 Met. 327. *Adams* v. *Cummiskey*, 4 Cush. 420. Nor unless a certificate authorizing an arrest is attached to the execution. *Rhodes* v. *Brooks*, 16 Gray, 170.

Upon the passage of the St. of 1877, c. 250, requiring notice to the debtor and a hearing by a magistrate before a certificate for arrest could be attached to an execution except in certain cases of fraud, it resulted that, when a debtor could not be found and notice could not be served upon him, no certificate for arrest could be obtained, and no effective return of *non est inventus* could be made upon the execution, and consequently *scire facias* could not be brought against the bail. To provide for such a case the St. of 1881, c. 263, § 4, was passed, which is incorporated in the Pub. Sts. c. 163, § 7, to the effect that upon an avoidance of a debtor, and a return on the notice that after diligent search by the officer serving the notice he is not found, his bail shall become liable.

The reason why sixty days must elapse before suit can be brought on account of an avoidance upon an execution with a certificate of arrest attached is, that until then the execution

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cannot be returned, and the avoidance is not complete. No such reason applies to an avoidance upon proceedings to obtain a certificate for arrest. The notice in such a case is returnable on the day fixed in it for the debtor's appearance. If a return of *non est inventus* is then made upon it, the avoidance is complete, the language of the statute is satisfied, and a suit may be immediately brought upon the bail bond.

The officer's return admitted in evidence was competent and sufficient. That part of it which referred to a "tenant, agent, or attorney" of the debtor was immaterial, and did not affect its validity. *Exceptions overruled.*

SAMUEL A. B. ABBOTT *vs.* HENRY W. FOOTE & another.

Suffolk. January 30, 1888. — March 2, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Trust and Trustee — Income — Assignment — Set-off — Probate Court.

A trustee cannot withhold the income of a trust fund from the beneficiary's assignee in order to repay to himself, by way of set-off, money lent by him to the beneficiary, prior to his appointment as trustee.

The Probate Court has no power to decide whether the trustee or the assignee is entitled to such income, and a decree allowing the trustee to credit himself with it towards his debt on an account, no personal notice of which was given to the assignee or the beneficiary, is void.

BILL IN EQUITY, filed December 6, 1886, against Henry W. Foote, trustee under the will of Eliza A. Dwight, and against Chapman Dwight, her son, to compel the payment of the income of a trust fund, created by the will for the latter's benefit, to the plaintiff as his assignee.

Hearing on the bill, answers, and agreed facts, before *C. Allen*, J., who reported the case for the consideration of the full court. The facts appear in the opinion.

J. G. Abbott, for the plaintiff.

M. Williams, for the defendant Foote.

MORTON, C. J. Mrs Dwight, by her will, gave to the defendant Foote, as trustee, a fund, upon the trusts to pay the

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income to her son, Chapman Dwight, during his life, and upon his death to divide the principal among his children. After her death, Chapman Dwight, for a valuable consideration, assigned to the plaintiff all his interest under his mother's will; and this suit is brought to require the trustee to pay to the plaintiff the income of the fund. The defence is, that Chapman Dwight owes the trustee, in his individual capacity, a sum of money borrowed before Mrs. Dwight's death, and he claims the right to apply the income as it accrues, by way of set-off, to the payment of his debt until it is extinguished.

The statute provides that, "in suits brought by or against executors, administrators, or trustees, in their representative character, no demand shall be set off that is due to or from such executors, administrators, or trustees in their own right." Pub. Sts. c. 168, § 15. It is clear that, in a suit at law, such a set-off as the defendant Foote claims could not be allowed. As is stated in *Spaulding* v. *Backus*, 122 Mass. 553, "In the matter of set-off, courts of equity follow the courts of law, except where there is some equitable ground, growing out of the transaction or the relation of the parties, which brings the case within the general jurisdiction of a court of equity, and justifies granting relief beyond the rule of law. The existence of cross demands is not a sufficient ground for interference; the party seeking the benefit of the set-off must show some peculiar equity which entitles him to be protected against his adversary's demand."

There may be cases in which a court of equity will practically extend the right of set-off existing at law. For instance, if a *cestui que trust* and a trustee, before any rights of other parties have attached, agree that the income coming to the former may, as it accrues, be applied to a debt due by him to the trustee, it may be that this would create an equitable lien in favor of the trustee, which a court of equity would enforce against the *cestui que trust*, or any one claiming under him. But equity will not enlarge the right of set-off at law, unless, by agreement or otherwise, such an equity or lien exists. *Spaulding* v. *Backus*, *ubi supra*. *Holbrook* v. *Bliss*, 9 Allen, 69, 77. *Upham* v. *Wyman*, 7 Allen, 499.

In the case at bar there was no such agreement, and there are no other circumstances which create an equitable lien or right

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of set-off in favor of the defendant Foote. The fact that he is a creditor of the *cestui que trust* is not sufficient. His appointment as trustee does not give him any advantage or superior rights over other creditors. His rights as a creditor remain unchanged. *Stickney* v. *Clement*, 7 Gray, 170.

In *Davis* v. *Newton*, 6 Met. 537, which was a suit in equity, it was held that an administrator who had in his hands a distributive share of his intestate's estate belonging to an insolvent debtor cannot withhold it from the debtor's assignee for the purpose of paying himself, by way of set-off, a debt due to him in his own right from such debtor. The same principle applies in this case, and we are of opinion that, as the trustee has no equitable lien and no legal or equitable claim superior to that of the other creditors or assignees of the *cestui que trust*, he has no right to retain the income given to Chapman Dwight under the will, and apply it to the debt due him in his private right. On the contrary, the plaintiff has the superior right and equity to this income, and is entitled to a decree in his favor.

The trustee contends that his right to a part of the income has been conclusively settled by a judgment of the Probate Court, and that this adjudication binds the plaintiff. The facts, as stated in the answer, are, that the trustee, having in his hands income to the amount of $116.38, payable under the will to Chapman Dwight, rendered an account to the Probate Court, in which he credited himself with this amount as paid and applied towards the discharge of his debt, and that this account was duly allowed by the Probate Court. Notice of this account was given by publication, but no personal notice was given to the plaintiff, or to Chapman Dwight. The plaintiff was not a party to this proceeding, and is not bound by it; but, further than this, the Probate Court had no jurisdiction of the question whether the plaintiff or the trustee had the right to the income. *Cowdin* v. *Perry*, 11 Pick. 503. *Hancock* v. *Hubbard*, 19 Pick. 167.

The claim of the defendant Foote to a right of set-off was a matter which the Probate Court has no power to hear and determine, and the allowance of his account, so far as it can be regarded as an adjudication of this question, is extra-judicial and void. *Decree for plaintiff.*

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JOHN J. DOREY *vs.* CITY OF BOSTON.

Suffolk. January 24, 1888. — March 3, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

City — Mayor and Aldermen — Sewer.

A city is liable, under the Pub. Sts. c. 50, relating to sewers, for the cost of a sewer built by direction of the aldermen with the approval of the mayor.

In July, 1883, the board of aldermen of Boston, under the sewer ordinance of 1883, which provides in § 1 for the choice of a superintendent of sewers to "take charge of the building and repairs," and to make "all contracts for the supply of labor and materials" of all sewers, under its direction, passed an order directing the superintendent to construct a sewer in H. Street, and in January, 1884, passed a further order, directing him to act during that year under the orders of its committee on sewers. In August, 1884, the superintendent, acting alone, made a contract for the construction of a portion of the sewer in H. Street. *Held*, in an action to recover for the cost of that portion, that the order of January, 1884, did not supersede the ordinance or the order of July, 1883, and that the city was liable.

CONTRACT for work done and materials furnished in building a sewer in Heath Street, in Boston. Trial in the Superior Court, before *Bacon*, J., who made a report of the case for the determination of this court, which, so far as material, was as follows:

The city clerk, called as a witness, produced the city records, which showed that on February 18, 1884, H. H. Moses was elected by the city government to be the superintendent of sewers for the year 1884, and that he entered upon the performance of his duties; and that the board of aldermen, on July 16, 1883, passed the following vote: "In Board of Aldermen, July 16, 1883. Whereas it appears to the board, that a necessity exists for the construction of a sewer in Heath Street, Ward 22, from its present termination to Day Street, and that public notice of such intent be given, — Ordered, that the superintendent of sewers be, and he is hereby, directed to construct a common sewer in said Heath Street, and to report a schedule of the expense to this board. Approved by Albert Palmer, Mayor." Also that the board of aldermen, on January 21, 1884, passed the following order: "Ordered, that the superintendent of sewers be author-

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ized, under the direction of the committee on sewers, to purchase materials and employ labor in the management of the sewer department during the present municipal year."

The plaintiff offered in evidence the city ordinance of 1883, in relation to sewers, section 1 of which is as follows: "There shall be chosen annually, by concurrent vote of both branches of the city council, a superintendent of sewers, who shall, under the direction of the board of aldermen, have the general supervision of all common sewers built and owned by the city of Boston, or permitted to be built or opened by its authority; shall take charge of the building and repairs of such sewers; and shall make all contracts for the supply of labor and materials therefor."

The plaintiff testified that he had been a sewer contractor and builder for twenty years; that he had built many sewers for the city of Boston; that he had built a part of this sewer on Heath Street, which was a part of the work comprised in the order passed by the board of aldermen on July 16, 1883; and that he did this work by the authority and direction of Moses, the superintendent of sewers, from whom he received his directions and orders on August 25, 1884, at his office in the city hall; but he offered no evidence that the superintendent of sewers in giving the order was acting under the direction of the committee on sewers.

The defendant contended that the order passed by the board of aldermen, on January 21, 1884, superseded the ordinance of 1883, and that it was incumbent on the plaintiff to show that whatever order was given him by the superintendent of sewers was by direction of the committee on sewers.

The judge ruled that the plaintiff could not recover, unless the plaintiff proposed to prove that the committee on sewers directed the superintendent to give such orders; that the order of January 21, 1884, superseded the ordinance of 1883; and, in the absence of such evidence on the part of the plaintiff, directed a verdict for the defendant. If the ruling was right, judgment was to be entered on the verdict; otherwise, the verdict was to be set aside, and a new trial granted.

P. A. Collins & J. H. Burke, (*G. A. Griffin* with them,) for the plaintiff.

R. W. Nason, for the defendant.

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C. ALLEN, J. The defendant now contends, though the objection does not appear to have been taken at the trial, that the city is under no liability to pay the cost of sewers built by direction of the aldermen with the approval of the mayor. But this ground of objection cannot be maintained. Sewers are built at the expense of the city, in the first instance, and a portion of the expense may afterwards be collected from persons whose estates are benefited. Pub. Sts. c. 50, §§ 1–4, 11. *Bennett* v. *New Bedford*, 110 Mass. 433.

The ground of objection relied on at the trial was, that the plaintiff could not recover, unless the work of building the sewer was done by the superintendent of sewers, under the direction of the committee on sewers; and the court so ruled, holding that the order of the board of aldermen passed on January 21, 1884, superseded that of July 16, 1883. This ruling we think erroneous. The Pub. Sts. c. 50, § 1, authorize the mayor and aldermen of a city to lay, make, and maintain sewers. The St. of 1882, c. 164, enacts that the words "mayor and aldermen" shall be construed to mean "board of aldermen." The city ordinance of 1883 provided for the annual choice of a superintendent of sewers, who should, under the direction of the board of aldermen, have the general supervision of all common sewers built and owned by the city, or permitted to be built or opened by its authority, and take charge of the building and repairs of such sewers, and make all contracts for the supply of labor and materials therefor. A superintendent of sewers was duly chosen, and on July 16, 1883, the board of aldermen passed an order that he be directed to construct a common sewer in Heath Street, and to report a schedule of the expense to the board. On January 21, 1884, the board passed another order "that the superintendent of sewers be authorized, under the direction of the committee on sewers, to purchase materials and employ labor in the management of the sewer department during the present municipal year."

The plaintiff's testimony was to the effect that he did the work in building the sewer in Heath Street, for which he now seeks to recover, by the authority and direction of the superintendent of sewers, received August 25, 1884; and if the last mentioned order of the board of aldermen superseded the first

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in respect to the sewer in Heath Street, the superintendent's power to act alone was taken away. But the two orders may well stand together. In relation to the sewer in Heath Street, the board of aldermen acted specially, and authorized the superintendent to construct it. The later order was more general in its character, and apparently was intended to relieve the board of aldermen to some extent of the care and duty which otherwise would have rested upon them during the current year; but not to make it necessary to obtain the direction of its committee in reference to this particular sewer, which the board itself had ordered the superintendent to construct.

In this view, it is not necessary to consider whether the board of aldermen could lawfully delegate such power to its committee; in respect to which see *Day* v. *Green*, 4 Cush. 433; *Lowell* v. *Simpson*, 10 Allen, 88; *Birdsall* v. *Clark*, 73 N. Y. 73; *State* v. *Paterson*, 5 Vroom, 163. *New trial granted.*

ROBERT POPE *vs.* ISAAC D. FARNSWORTH, executor.

Suffolk. January 25, 1888. — March 3, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Will — Devise and Legacy — Trust — Interest.

If a testator by his will gives the income of a legacy to his son and to his son's wife, and provides that upon their death the legacy is to be paid over by the executor, "with interest and income to their son R. for his own use and on the decease of the said R., if he dies without children as he is unmarried," to the residuary legatee, R., who survives his parents, is married, and has children, has an absolute right to the legacy.

A beneficiary may authorize his trustee to do what otherwise would be a breach of trust, or release and agree to hold him harmless for such an act after it is done.

An executor, after making payments out of a trust fund and depositing the balance with a trust company for the benefit of a life tenant, to all of which the remainder-man agreed, made a further payment out of the fund, without his knowledge or agreement, to secure more frequent payments of income to the life tenant. After the latter's death the remainder-man made a demand upon the executor for the fund, stating that the trust company, which had agreed to repay the fund to the executor within sixty days of proof of the life tenant's death, was ready to pay it over. *Held*, that the remainder-man could not recover for the

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payments assented to by him, but that the executor was liable for the fund as undiminished by the unauthorized payment. *Held, also,* that interest was recoverable on the latter payment from the life tenant's death, and on the balance of the fund from the date of the demand.

CONTRACT, under the Pub. Sts. c. 136, § 19, against the surviving executor of the will of Paschal P. Pope, for a legacy of $20,000 given to the plaintiff by the will, which was dated May 1, 1866. Writ dated August 14, 1885. The defendant died on January 16, 1886, and Charles A. Prince, who was appointed administrator with the will annexed of the estate of said Pope, was admitted to defend the action.

The case was submitted to this court on an agreed statement of facts, in substance as follows:

The will contained the following provision: "To Mr. Robert Pope, now of South Windsor, State of Maine, I give and bequeath the interest and income of twenty thousand dollars during his life to be paid him on his receipt made at the time, or on the receipt of his wife made at the time, if he should be unable to give it from infirmities he may then be suffering under, and to enable my executors to do this I direct that they shall deposit twenty thousand dollars in the Massachusetts Hospital Life Insurance Company. My executors will in this case consider the income of this twenty thousand dollars at the disposal of said Robert Pope or of his wife and on the decease of both they will pay over the said twenty thousand dollars with the interest and income to their son Robert Pope for his own use and on the decease of the said Robert, if he dies without children as he is unmarried, my executors shall pay over the said twenty thousand dollars to the person who shall be made by this will my residuary legatee."

On April 25, 1867, the executors under the will, having reserved out of the $20,000 the sum of $800 for the payment of a legacy tax, supposed to be due and payable, deposited with the Hospital Life Company the balance of $19,200, under a trust agreement which provided for the yearly payment by the company of the income of the trust fund to the life tenants. On September 1, 1867, the executors paid out of the $800 so reserved, $289.64 as a legacy tax, and $491.52 to the life tenants, under an agreement under seal, dated September 18, 1867, and

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executed by them and by the plaintiff, which, after reciting the above deposit and payments, and that they were made at his and their "especial instance and request," proceeded as follows: "Now in consideration of the premises we the said Robert Pope, Julia C. Pope and Robert Pope, Jr., do jointly and severally covenant and agree to indemnify and save harmless the said executors from all other claims on said fund and do acknowledge that the above payments are in full and entire satisfaction and discharge of said legacy and every part thereof; and they further agree to pay any further legacy or succession duty or tax that may be hereafter assessed upon said fund or any part thereof and to indemnify said executors against the payment of any such duty or tax, hereby ratifying all the doings of said executors in relation to said legacy." At the same time the executors, desiring to secure quarter-yearly payments of the income of the trust fund instead of the yearly payment provided for by the trust agreement, made, without the knowledge or subsequent agreement of the plaintiff, a further payment to the insurance company of $318.84, of which $300 was taken out of the $19,200 already deposited with the company, and $18.84 was the balance of the $800 remaining in their hands. The trust agreement was thereupon cancelled, and the balance of the fund, amounting to $18,900, was re-deposited by the executors with the insurance company under a second trust agreement, which provided for such quarter-yearly payments of the income, and that "in sixty days after proof of the decease" of the life tenants the principal sum, and all interest then due, should be paid over to the executors, or their successors, to be by them disposed of according to the provisions in the will.

Robert Pope, senior, died on July 14, 1870, and Julia C. Pope, his wife, died on May 9, 1885. The plaintiff who was a resident of Gardiner, Maine, and was married on June 4, 1868, and had two children born of that marriage living, made a demand on the defendant, as surviving executor, for the payment of the legacy of $20,000, on June 18, 1885, and again on June 29, 1885, by letters of the same tenor, which stated that "the Massachusetts Hospital Life Insurance Company informs me that the money deposited with them is ready for payment by them to you, and moreover that interest thereon is stopped." On May 28,

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1886, the administrator with the will annexed surrendered the second trust agreement to the insurance company, and received therefor the sum of $18,976.12, principal and interest due thereon.

If the plaintiff was entitled to maintain his action, judgment was to be entered for so much of the principal sum of $20,000 as the court should order, with interest thereon from the date of the last payment of income to Julia C. Pope to the date of her death, and interest thereon from the date of her death on May 9, 1885, or from the date of demand, as the court might determine, to the date of judgment, less such payments on account of interest as had been made by the administrator with the will annexed, the latter, as well as the rate of interest from April 1, 1885, to the death of Julia C. Pope, to be determined by an assessor, unless the parties could agree thereon. If the plaintiff was not entitled to maintain this action, such decree might be entered as to the disposition of the principal sum found to be due, and to preserve the rights of the parties thereunder, as equity might require; or, if he was not entitled to this legacy as absolute owner thereof, the court might make such decree for the purpose of ascertaining the fitness of Robert Pope to receive the same, with or without security, as might seem proper."

R. D. Smith & R. D. Weston-Smith, for the plaintiff.

R. Grant, for the defendant.

HOLMES, J. This is an action for a legacy of $20,000, brought under the Pub. Sts. c. 136, § 19. The main question is whether the plaintiff, Robert Pope the younger, has an absolute or defeasible interest under the will of Paschal P. Pope. The will provides, that, on the decease of both Robert Pope and his wife, to whom the income of the fund was given for life, the testator's executors "will pay over the said twenty thousand dollars with interest and income to their son Robert Pope for his own use and on the decease of the said Robert, if he dies without children as he is unmarried, my executors shall pay over the said twenty thousand dollars to the person who shall be made by this will my residuary legatee." The plaintiff has survived his parents, is married, and has children.

We are of opinion that the interest of the plaintiff is absolute, and that the provision in case he dies without children is only an

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alternative direction as to the person to whom the executors shall pay over the fund when the life tenants shall have died, and the contemplated moment comes for terminating the trust and paying over the principal. The governing thought in the sentence is, that at the death of the life tenants the fund is to be paid over; if Robert Pope, the son, is then alive, it is to be paid to him; if he has died without children, it is to be paid to the residuary legatee. Only one payment and only one time for payment are contemplated. It is not intended that, if the executors should have paid over once to Robert Pope, the son, they should get back the fund in a certain event thereafter, and pay it over a second time. Our construction is confirmed by the words in which the payment to the plaintiff is directed: "the said twenty thousand dollars with the interest and income . . . for his own use." These words express an absolute gift unequivocally. Capital as well as income is to be for his own use, if it is paid to him. Such a direction is hardly consistent with a construction of the next clause which would subject the fund to a contingent executory limitation over at his decease, in favor of the residuary legatee. See *Olivant* v. *Wright*, 1 Ch. D. 346; *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388, 397, 406; *In re Luddy*, 25 Ch. D. 394.

It is true that the words "and on the decease of said Robert," taken by themselves, look to his death at any time; but in view of the rest of the sentence, and the consequences of the different constructions contended for, we should read that and the following language as meaning "or in the event of Robert having died without children before that time," &c.

There may be a question whether the phrase "as he is unmarried" is to be read as merely explaining why the possibility of Robert's death without children is contemplated, or whether it still further qualifies the contingency, so that the sentence means in case of the death of Robert without ever having had any children because of his being unmarried or while unmarried. The last mentioned event can never happen, as Robert has married and has children. But as the plaintiff must recover for the reasons first given, it is unnecessary to consider this or other questions suggested by the clause.

The executors paid about eight hundred dollars of the princi-

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pal, partly for a legacy tax and partly to the tenants for life. The plaintiff then executed a sealed instrument, reciting that these payments (stated to be $308.48 and $491.52) and an investment of $19,200 in the Massachusetts Hospital Life Insurance Company were made at his request, covenanting to save the executors harmless from all other claims on the fund, acknowledging that the payments recited were in full satisfaction of the legacy, and ratifying all the doings of the executors. The plaintiff must stand to his agreement. There is no illegality in a *cestui que trust* authorizing an act which otherwise would be a breach of trust towards himself, or in his releasing or agreeing to hold harmless his trustee for such an act after it is done.

No authority or release is shown, however, for diminishing the capital directed to be deposited in the Hospital Life Company by $300 in order to secure quarterly instead of annual payments to the tenants for life. This sum must be added to the amount to be recovered.

As the contract with the Hospital Life Insurance Company was directed to be made by the will, and was accepted by the plaintiff in full satisfaction of his legacy, we think that the executors should not be charged with interest upon $18,900 after the death of Julia C. Pope, when it ceased to be paid by the company, until such time as they reasonably could have obtained and paid over the fund. The contract gives the company sixty days after proof of death. If, as stated in the demand, the company was ready to pay when the demand was made, interest may be allowed from that time. Interest will be computed upon the $300 misapplied from the date of Julia C. Pope's death. The payments heretofore made will be allowed as agreed.

Judgment for plaintiff for $19,200, *and interest, to be determined by an assessor.*

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GEORGIANNA WHALL *vs.* JAMES W. CONVERSE, trustee.

Suffolk. January 30, 1888. — March 30, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Will — Devise and Legacy — Heirs — Trust — Equitable Title.

If a testator by his will gives the income of a trust fund to his wife until her death or remarriage, and, in either event, to his son and daughter, the principal if the wife survives them and their issue, if any, to go on her death as she may direct by will, or, in default of a will, "then to my heirs at law," the bequest over is to those who are the heirs of the testator at the time of his death.

If the daughter dies intestate and without issue, and the son dies without issue, leaving his interest in the trust fund to a third person, who assigns it to the wife, the latter, who has never married again, acquires the equitable title to the whole fund, and has the right to terminate the trust.

BILL IN EQUITY, filed February 8, 1887, against the surviving trustee under the will of Joseph B. Whall, to terminate a trust created by the will, alleging the following facts.

Joseph B. Whall died in November, 1858, leaving a widow, the plaintiff, and, as his only heirs at law and next of kin, Joseph H. Whall, a son by a former wife, and Grace H. Whall, a daughter by the plaintiff. The will, which was admitted to probate on November 29, 1858, and appointed John Field and James W. Converse as trustees, contained the following provisions, which alone are material:

"I give to the said Field and Converse twenty thousand dollars in trust to pay the net income therefrom to my said wife, during her life, or until and not longer than she shall marry again, taking therefor her sole and separate receipt at or before the making of each payment; and upon her decease, or upon her being married again to dispose of the principal thereof as follows: to continue to hold the same in trust for the equal benefit of my children and to pay to my daughter three thousand dollars at any time when after she shall have attained the age of eighteen years she shall in writing request, and until such payment to pay the net income therefrom in equal shares to or for the use of my son and my daughter or the survivor of them during their his or her lives or life; and after such payment, to pay the net

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income from seven thousand dollars of said principal to my daughter and from ten thousand dollars of said principal to my son, to her and to his own use during his and her lives, but in each case and always upon his and her separate receipts to be taken at or before the making of each payment. If either of my children shall die before my wife leaving no issue living, then the whole of said income shall go as aforesaid to my surviving child, and if either or both of my children shall die before my wife and shall leave issue living, such issue shall take the share or shares of its deceased parent or parents, of said income during the life of my wife. Upon the decease of my children respectively, their several shares of the principal then in trust for their benefit shall after the decease of my wife go to their issue respectively, if they shall die leaving issue living, and if either of them shall die leaving no issue living his or her share as aforesaid shall be held still in trust for the benefit as above provided of the survivor, until his or her decease and shall then go after the decease of my wife to his or her issue or in default of issue to my heirs at law.

"In case my wife shall survive both my children and their issue, if any, the said principal shall go and be disposed of at her decease in accordance with her last will or any instrument in writing signed by her in the nature of a testamentary disposition of property or in default of a last will or other instrument as aforesaid, then to my heirs at law.

"All the rest residue and remainder of my estate and property, real personal and mixed, I give devise and bequeath to my said son and daughter, to have and to hold the same in equal shares to them their heirs and assigns forever.

"It is my will, and notwithstanding anything to the contrary hereinbefore provided I hereby order and require that all the estate and property other than income (excepting only the three thousand which she may receive upon her written request) which shall under this will come to my daughter shall not be paid over to her to her own use, but shall be retained or placed in trust for her benefit so that she shall during her life receive the net income therefrom upon giving therefor her sole and separate receipt at or before the making of each payment thereof and upon her decease the principal thereof shall be paid over

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appropriated and disposed of in accordance with the provisions of her last will or any instrument in writing signed by her in the nature of a testamentary disposition of property, or in default of such will or other instrument to her heirs at law."

The plaintiff had never married since the death of Joseph B. Whall, and had received since his death the net income of the trust fund from the trustees, and since the death of Field from the defendant as surviving trustee. Grace H. Whall was born on August 29, 1853, and died intestate and without issue on September 7, 1861, and leaving her mother and her brother surviving, in whom became vested all the property and rights which she had, including those which she had or could have in the trust fund. Joseph H. Whall died testate, never having been married, and without issue, on February 3, 1876, being at that time between thirty-one and thirty-two years of age, and by his will, which was admitted to probate on March 6, 1876, gave all his estate to Janet Cumston Lord, afterwards Janet Cumston Moody, in whom vested whatever rights or interest he had or could have in the trust fund. Janet Cumston Moody, by her assignment in writing, dated October 6, 1886, conveyed to the plaintiff, her executors, administrators, and assigns forever, all her right, title, interest, estate, and claim, whether contingent or otherwise, in and to the trust fund held by the defendant, as surviving trustee, including all rights that might accrue upon and after the marriage of the plaintiff, if she should marry again, or upon the death of the plaintiff without having disposed of the principal by will, or by any instrument in writing, signed by her, in the nature of a testamentary disposition of property. By the death of Grace H. Whall and Joseph H. Whall, both without issue, and the assignment from Janet Cumston Moody, the plaintiff had become entitled to the income of the trust fund in case she should marry again, and had become entitled to the principal of the trust fund even in case she should fail to dispose of the same by will or an instrument in writing, signed by her, in the nature of a testamentary disposition of property.

The prayer of the bill was, that the trusts upon which the defendant, as surviving trustee, held the trust fund, might be decreed to be terminated, and he might be ordered to pay over

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to the plaintiff the trust fund, principal and income, and all property representing the same, discharged of all trusts.

The answer, after admitting the allegations of the bill, save as to any remarriage of the plaintiff, proceeded as follows: "This defendant says that he is advised that the rights of the plaintiff depend mainly upon the construction of said will of said Joseph B. Whall, and, if the plaintiff should marry again, whether the income of the trust fund during the residue of her life would then fall into the residuum, or go to those who were the heirs at law of the testator at the time of his death, or to those who would be his heirs at law at the time of the happening of that contingency, if he had then died intestate, or vested in his son, who survived his daughter; and whether, in case the plaintiff shall die without disposing of said trust fund by her last will or by an instrument in writing, signed by her, in the nature of a testamentary disposition of the property, the principal of said trust fund would then go to those who would then be the heirs at law of the testator, if he had then died intestate, or vested in those who were his heirs at law at the time of his death, are questions which this defendant should not undertake to decide, but questions which should be submitted to this honorable court."

The case was heard upon the pleadings and an affidavit, by *C. Allen*, J., who found as a fact that the plaintiff had never married after the death of her husband, Joseph B. Whall, and reserved the case for the consideration of the full court.

J. D. Ball, for the plaintiff.

W. H. Orcutt, for the defendant, submitted the case without argument.

HOLMES, J. The general rule is settled, that, in case of an ultimate limitation like that of the fund in question to the testator's heirs at law, the persons to take are those who answer the description at the time of the testator's death. *Dove* v. *Torr*, 128 Mass. 38, 40. *Minot* v. *Tappan*, 122 Mass. 535, 537. *Abbott* v. *Bradstreet*, 3 Allen, 587. The reasons for this rule are, that the words cannot be used properly to designate anybody else; that such a mode of ascertaining the beneficiary implies that the testator has exhausted his specific wishes by the previous limitations, and is content thereafter to let the law take its course; and,

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perhaps, that the law leans toward a construction which vests the interest at the earliest moment. There is nothing to take this case out of the general rule, and it requires no discussion beyond what will be found in the decisions cited.

It follows, without further construction of the words heirs at law, and whether or not any part of the income or principal in any event would fall into the residuum or pass as property undisposed of by the will, that the plaintiff and the testator's son and daughter took the whole fund among them. The plaintiff has now acquired the son's and the daughter's interests; *Whipple* v. *Fairchild*, 139 Mass. 262, 265; *Welsh* v. *Woodbury*, 144 Mass. 542, 545, and cases cited; and therefore has the equitable title to the whole fund, and the right to terminate the trust. *Inches* v. *Hill*, 106 Mass. 575. *Underwood* v. *Boston Five Cents Savings Bank*, 141 Mass. 305, 306. *Decree for plaintiff.*

JESSE ROGERS *vs.* THOMAS P. ELLIOTT.

Barnstable. January 31, 1888. — March 3, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Private Nuisance — Bell Ringing — Malice.

The custodian of a church does not, by refusing to stop the ringing of its bell for the usual services, become liable to a person suffering from sun-stroke in an adjacent house, who is thrown thereby into convulsions which retard his recovery.

TORT for a nuisance, namely, the ringing of a church bell. At the trial in the Superior Court, before *Staples*, J., there was evidence tending to prove that the plaintiff, who lived with his father in a thickly settled portion of Provincetown, had received a sun-stroke, and was carried home and a physician called to attend him; that directly opposite his father's house across a street but twenty feet in width was a Roman Catholic Church, of which the defendant was the clergyman in charge; that one of the incidents of the plaintiff's illness was that loud noises might throw him into convulsions; that the defendant was in-

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formed by the physician and the plaintiff's father of the probable consequences to the plaintiff of the ringing the bell upon his church, and was requested not to ring it; that the defendant refused to refrain from ringing the bell, but caused it to be rung eight times upon the next Sunday, as usual, twice before each of the four services held upon that day; that the plaintiff, the windows of whose room were shut, was thrown into violent and painful convulsions at each time that the bell on the church was rung, as well as when other bells in the town were rung, or a whistle on a steamboat in the harbor was blown, and once when the town clock struck; and that the convulsions increased the illness and retarded the recovery of the plaintiff.

The judge ruled that the plaintiff was not entitled to recover, and ordered a verdict for the defendant; and reported the case for the determination of this court. If the ruling was wrong, the verdict was to be set aside and a new trial granted; otherwise, judgment was to be rendered on the verdict.

H. M. Knowlton, for the plaintiff, stated in his brief, that "the plaintiff does not rely upon any evidence of express malice on the part of the defendant. But he claims that, under all the circumstances of the case, the law would imply malice on his part."

J. J. McDonough, for the defendant.

KNOWLTON, J. The defendant was the custodian and authorized manager of property of the Roman Catholic Church used for religious worship. The acts for which the plaintiff seeks to hold him responsible were done in the use of this property, and the sole question before us is whether or not that use was unlawful. The plaintiff's case rests upon the proposition that the ringing of the bell was a nuisance. The consideration of this proposition involves an inquiry into what the defendant could properly do in the use of the real estate which he had in charge, and what was the standard by which his rights were to be measured.

It appears that the church was built upon a public street in a thickly settled part of the town, and if the ringing of the bell on Sundays had materially affected the health or comfort of all in the vicinity, whether residing or passing there, this use of the property would have been a public nuisance, for which there

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would have been a remedy by indictment. Individuals suffering from it in their persons or their property could have recovered damages for a private nuisance. *Wesson* v. *Washburn Iron Co.* 13 Allen, 95.

In an action of this kind, a fundamental question is, by what standard, as against the interests of a neighbor, is one's right to use his real estate to be measured. In densely populated communities the use of property in many ways which are legitimate and proper necessarily affects in greater or less degree the property or persons of others in the vicinity. In such cases the inquiry always is, when rights are called in question, what is reasonable under the circumstances. If a use of property is objectionable solely on account of the noise which it makes, it is a nuisance, if at all, by reason of its effect upon the health or comfort of those who are within hearing. The right to make a noise for a proper purpose must be measured in reference to the degree of annoyance which others may reasonably be required to submit to. In connection with the importance of the business from which it proceeds, that must be determined by the effect of noise upon people generally, and not upon those, on the one hand, who are peculiarly susceptible to it, or those, on the other, who by long experience have learned to endure it without inconvenience; not upon those whose strong nerves and robust health enable them to endure the greatest disturbances without suffering, nor upon those whose mental or physical condition makes them painfully sensitive to everything about them.

That this must be the rule in regard to public nuisances is obvious. It is the rule as well, and for reasons nearly if not quite as satisfactory, in relation to private nuisances. Upon a question whether one can lawfully ring his factory bell, or run his noisy machinery, or whether the noise will be a private nuisance to the occupant of a house near by, it is necessary to ascertain the natural and probable effect of the sound upon ordinary persons in that house, — not how it will affect a particular person, who happens to be there to-day, or who may chance to come to-morrow. *Fay* v. *Whitman*, 100 Mass. 76. *Davis* v. *Sawyer*, 133 Mass. 289. *Walter* v. *Selfe*, 4 DeG. & Sm. 315, 323. *Soltau* v. *De Held*, 2 Sim. (N. S.) 133. *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. Cas. 642.

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In *Walter* v. *Selfe*, Vice-Chancellor Knight Bruce, after elaborating his statement of the rule, concludes as follows: "They have I think established that the defendant's intended proceeding will, if prosecuted, abridge and diminish seriously and materially the ordinary comfort of existence to the occupier and inmates of the plaintiff's house, whatever their rank or station, whatever their age, or whatever their state of health."

It is said by Lord Romilly, Master of the Rolls, in *Crump* v. *Lambert*, L. R. 3 Eq. 409, that "the real question in all the cases is the question of fact, viz. whether the annoyance is such as materially to interfere with the ordinary comfort of human existence."

In the opinion in *Sparhawk* v. *Union Passenger Railway*, 54 Penn. St. 401, these words are used: "It seems to me that the rule expressed in the cases referred to is the only true one in judging of injury from alleged nuisances, viz. such as naturally and necessarily result to all alike who come within their influence."

In the case of *Westcott* v. *Middleton*, 16 Stew. (N. J.) 478, it appeared that the defendant carried on the business of an undertaker, and the windows of the plaintiff's house looked out upon his yard, where boxes which had been used to preserve the bodies of the dead were frequently washed, and where other objects were visible and other work was going on, which affected the tender sensibilities of the plaintiff, and caused him great discomfort. Vice-Chancellor Bird, in dismissing the bill for an injunction against carrying on the business there, said: "The inquiry inevitably arises, if a decision is rendered in Mr. Westcott's favor, because he is so morally or mentally constituted that the particular business complained of is an offence or a nuisance to him, or destructive to his comfort or his enjoyment of his home, how many other cases will arise and claim the benefit of the same principle, however different the facts may be, or whatever may be the mental condition of the party complaining. . . . A wide range has indeed been given to courts of equity in dealing with these matters; but I can find no case where the court has extended aid unless the act complained of was, as I have above said, of a nature to affect all reasonable persons, similarly situated, alike."

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If one's right to use his property were to depend upon the effect of the use upon a person of peculiar temperament or disposition, or upon one suffering from an uncommon disease, the standard for measuring it would be so uncertain and fluctuating as to paralyze industrial enterprises. The owner of a factory containing noisy machinery, with dwelling-houses all about it, might find his business lawful as to all but one of the tenants of the houses, and as to that one, who dwelt no nearer than the others, it might be a nuisance. The character of his business might change from legal to illegal, or illegal to legal, with every change of tenants of an adjacent estate; or with an arrival or departure of a guest or boarder at a house near by; or even with the wakefulness or the tranquil repose of an invalid neighbor on a particular night. Legal rights to the use of property cannot be left to such uncertainty. When an act is of such a nature as to extend its influence to those in the vicinity, and its legal quality depends upon the effect of that influence, it is as important that the rightfulness of it should be tried by the experience of ordinary people, as it is, in determining a question as to negligence, that the test should be the common care of persons of ordinary prudence, without regard to the peculiarities of him whose conduct is on trial.

In the case at bar it is not contended that the ringing of the bell for church services in the manner shown by the evidence materially affected the health or comfort of ordinary people in the vicinity, but the plaintiff's claim rests upon the injury done him on account of his peculiar condition. However his request should have been treated by the defendant upon considerations of humanity, we think he could not put himself in a place of exposure to noise, and demand as of legal right that the bell should not be used.

The plaintiff, in his brief, concedes that there was no evidence of express malice on the part of the defendant, but contends that malice was implied in his acts. In the absence of evidence that he acted wantonly, or with express malice, this implication could not come from his exercise of his legal rights. How far and under what circumstances malice may be material in cases of this kind, it is unnecessary to consider.

Judgment on the verdict.

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ELIZABETH O. P. STURGIS *vs.* ANN C. PAINE & others.

Suffolk. January 31, 1888. — March 3, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Will — Devise and Legacy — Capital and Income — Trust.

A testator, after expressing his "desire" that a residue should go to his grandchildren, "reserving the use of the personal property and the net income of the real estate" to his son's wife, their mother, "during her life and widowhood" if she survived his son, "to this end" gave the residue to his son in trust to apply the income "at his discretion" for the care and education of such grandchildren; provided that, if his son should die, his son's wife while his widow "shall in like manner receive" such income "to her own use and for the education and support of my said grandchildren at her discretion"; and directed that neither his son nor his son's wife should be held to account for property personally occupied by them, and that proceeds of real estate should be applied to improve his estate, or for the grandchildren's education and support. *Held*, that the son's wife, as his widow, had the right in good faith to appropriate the whole income to her own use.

A devise of the residue of a testator's estate to his wife, to be "at her sole use and disposal," followed by this clause, "My said wife is fully acquainted with my reasons for this disposal of my estate, and will by her own last testament do what is right and just to my children and their natural heirs," does not create a trust in favor of the children, but gives the wife an absolute title.

BILL IN EQUITY, filed October 11, 1884, to establish trusts for the benefit of the plaintiff under the wills of her grandfather, William Paine, and of her father, Frederick William Paine.

The case was heard by *Field*, J., and reserved for the consideration of the full court, on the pleadings and an agreed statement of facts, and was in substance as follows.

William Paine died in 1833, leaving a will, whereby he devised the residue of his property as follows:

"Fourth. As to the residue of my property, it is my desire that the same should be secured for the benefit of my grandchildren, the children of my son, Frederick William Paine, reserving the use of the personal property and the net income of the real estate to Ann C. Paine, wife of said Frederick, during her life and widowhood, upon the contingency of her surviving her said husband; and to this end I give, devise, and bequeath all my estate, real, personal, or mixed, and wherever the same may be found, not before disposed of in this will, to my son,

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Frederick William Paine, and his heirs forever. To have, hold, and possess the same to him and them upon the trusts and to the uses hereinafter mentioned, and to no other use, trust, or purpose whatever; that is to say, the said Frederick shall annually receive the rents, interest, and profits of said estates, and, after deducting the necessary expenses for repairs, taxes, and other charges in and about the same, shall retain the balance in his own hands, to be applied by him at his discretion for the support, maintenance, and education of the children of the said Frederick and his present wife, Ann C. Paine, including the children now born as well as such as may at any time hereafter be born to them, either before or subsequent to my decease. And in the event of the decease of my said son, his said wife, so long as she shall survive him and continue his widow, shall in like manner receive the said rents, interest, and profits to her own use and for the education and support of my said grandchildren at her discretion. Upon the event of the demise of my said son, I direct that the judge of probate for said county of Worcester shall appoint one or more trustees to take upon him or them the execution of these trusts, who shall stand seised of said estates in the same manner as I have directed in case of my son Frederick during his lifetime, and as fully as if they were personally named in this will. And the said trustee or trustees so appointed shall hold said estates to the following trusts; that is to say, to pay over the balance of said trust funds to Ann C. Paine, my daughter-in-law before named, during her life or widowhood, and upon the event of her contracting a second marriage, then it is my will that said trustee or trustees shall stand seised of said real estates and hold and possess said personal property to the use of my said grandchildren, the children of Frederick William and Ann C. Paine, during their minority, and whenever either of said children shall arrive at full age, said trust, as it relates to him or her respectively, shall cease and determine, and said child shall stand seised in fee simple of his or her share in said real estate and personal estate, in the same manner as if it had been bequeathed to him or her without the intervention of trustees. Provided, however, that said trust shall not determine during the lifetime of my said son, nor until the death or second marriage of the said Ann C. Paine. Upon the

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termination of said trust, said property shall be equally divided between such of said grandchildren as may then be alive, and if either of them shall decease before a division of said property, leaving lawful issue, the issue of such deceased grandchild shall be entitled to the same share in the distribution as his or her ancestor would had they been living.

"In case my son should not accept the trust hereby vested in him, or in case of his subsequent resignation of the same, or in case of a vacancy in the trust at any time, then one or more trustees shall be appointed by the judge of probate, the Court of Chancery, or other proper tribunal, in manner as is hereinbefore directed. And the said trustee or trustees so appointed shall stand seised of said estates and personal property to the uses herein specified. Provided, however, that no trustee shall be appointed during the lifetime of my said son without his consent.

"The trustees herein provided for shall in all cases render an inventory of said estates and funds from time to time, as they may be ordered by the proper tribunal, and shall give satisfactory bonds for the faithful execution of said trusts. Provided that no other security shall be required of my said son, while in the execution of said trust, but his own personal bond. Any other trustee shall pay over the net proceeds of said estates, real and personal, to the joint order of my said son and his said wife during their lives, and to the order of the survivor of them during life, or during the widowhood of the said Ann C. Paine, to be by them appropriated as is before provided. It is my further direction, that my said son or his wife shall never be held to account for the rent, income, or use of such parts of my property or chattels as they shall personally occupy, and such personal occupation shall not be construed to impair this trust.

"My trustees, whether appointed by me or by any proper tribunal, shall have power to sell and pass deeds of any part of my real estate (excepting the home farm and every part thereof), either in fee simple, absolute, or upon mortgage or any less estates, and for the proceeds of any such conveyances they shall render an account as is before provided, and the same shall be applied solely for the improvement of said estates, or for the education and maintenance of my said grandchildren."

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Frederick William Paine held the position of trustee under this will, from 1833 to September, 1869, when he died, and the defendant, Nathaniel Paine, was appointed trustee in his stead on November 16, 1869, and has so continued ever since. Nathaniel Paine proceeded to convert the greater part of the home farm so called into money by sales under a decree of the Probate Court, and established from the proceeds a trust fund, which, as increased by other sales from time to time, he invested in income-yielding securities. The income upon these securities, and the rents and profits of real estate remaining unsold, were paid over by the trustee, after deducting expenses and charges, to the defendant Ann C. Paine, without seeing to its application by her in any part for the support of the plaintiff, who is a child of Ann C. Paine and Frederick William Paine, and grandchild of William Paine, or that any part of the same was paid to her or accumulated for her use and benefit. Ann C. Paine invested the income, rents, and profits, including all accumulations not consumed by her in her own support, or in the support of her children other than the plaintiff, in various ways, and on or before May 1, 1884, gave large sums, as well as the mansion-house on the home farm purchased by her, to the defendant George S. Paine as voluntary gifts, and gave to the defendants George S. Paine and James P. Paine all of the accumulations of income, rents, and profits. The plaintiff has received no part of the income of the trust fund or rents and profits, and has, under the belief that she was entitled to a vested share and interest therein, allowed the same to accumulate for her future use and benefit.

Nathaniel Paine contended that, upon paying the income of the proceeds of the sales of the homestead farm and such rents and profits to Ann C. Paine, his powers and duties, as trustee under the will, regarding the income and rents and profits, ceased; and the defendant Ann C. Paine contended that by the terms of the will she became the absolute, sole, and exclusive owner of such income and rents and profits, with the right to dispose of the same to George S. Paine and James P. Paine, to the exclusion of the plaintiff and the children of deceased grandchildren of the testator, both before and after its accumulation and investment; that the gifts of accumulated income and rents

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and profits to George S. Paine and James P. Paine, not consumed in her personal support, or necessary for their personal support and maintenance, were made by her as of right, and that the plaintiff had no right, title, or interest in any part of the income derived from the proceeds of the sales of land of the homestead farm, or rents and profits, by reason of any devise, bequest, or trust in the will.

The plaintiff contended that, by the terms of the will, she had a vested right and interest in the income of the proceeds of sales of land of the homestead farm, and in the other rents and profits, and in all accumulations thereof; that she had a right to allow the same to accumulate for her future use and benefit, and was not thereby deprived of her right to the same; that both the trustee and Ann C. Paine were bound to see that the income, rents, and profits were applied or accumulated for her use and benefit, in common with the application and accumulation thereof for the use and benefit of Ann C. Paine and the other grandchildren of the testator; that the conveyances of the accumulated income and rents and profits by Ann C. Paine were in violation of her rights thereto under the will, and against the intention of the testator; and that the trustee, Ann C. Paine, George S. Paine, and James P. Paine, were bound to account to her for her share of such accumulated income and rents and profits.

On November 16, 1869, Frederick William Paine died, leaving a will. After directing his debts and funeral expenses to be paid, he devised the residue of his property as follows: "Fourthly. I give to my wife, Ann C. Paine, all the rest of my estate, whatever the same may be, to be at her sole use and disposal. My said wife is fully acquainted with my reasons for this disposal of my estate, and will by her own last testament do what is right and just to my children and their natural heirs." On the settlement of his estate, the residue in money was paid over to Ann C. Paine.

Ann C. Paine invested the money received by her on the settlement of her husband's estate in securities, all of which she assigned to George S. Paine and James P. Paine as gifts, and conveyed to them all of the real estate and other property received by her from that estate as their absolute property, to the

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exclusion of the plaintiff and the children of deceased children of Frederick William Paine, and retained no property in her hands or possession to be disposed of by will.

Ann C. Paine, George S. Paine, and James P. Paine contended that the will of Frederick William Paine vested Ann C. Paine with an absolute title, and the right to dispose of the same by deed and gift during her lifetime, to the exclusion of the plaintiff, and that the conveyances by her were valid under the will.

The plaintiff contended that Ann C. Paine had only the use of the property, and not the absolute title to it, and could dispose of the same by will only to her children and their natural heirs, and that her conveyances and gifts to George S. Paine and James P. Paine, in exclusion of the other children of the testator, were in violation of the intention of the testator as expressed in the will.

If the court were of opinion that the plaintiff had any title and interest in the income of the proceeds of the sales of the homestead farm under and as devised or bequeathed by the will of William Paine, or in the rents and profits of his unsold real estate, or any title or interest in the estate of Frederick William Paine under his will, the case was to be referred to a master to state the account thereof; otherwise, the bill was to be dismissed.

F. P. Goulding & C. A. Merrill, for the plaintiff.

I. The direction to Ann C. Paine by the testator, William Paine, is imperative, imports a trust, and gives each of the testator's grandchildren a beneficial interest in common with their mother. *Rich* v. *Rogers*, 14 Gray, 174, 176. *Loring* v. *Loring*, 100 Mass. 340. *Buffinton* v. *Maxam*, 140 Mass. 557. *Proctor* v. *Proctor*, 141 Mass. 165, 169. *Jubber* v. *Jubber*, 9 Sim. 503.

Ann C. Paine and her children had a vested joint interest in the rents, profits, and income, as and when they accrued. When received by her, their receipt was upon the double trust, "to her own use and for the education and support of my said grandchildren," the words "at her discretion" relating solely to the time and manner of enjoyment, and not to the title. The words "shall in like manner receive" refer to her quality of interest in the rents and income when received, similar to the interest

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in the income given her husband by the prior clause, and not to quantity of estate or time of receipt alone. If a trust was conferred upon her husband when he received the rents and income, her interest was limited to a trust. *Lumley* v. *Robbins*, 10 Hare, 624. *Woodall* v. *Woodall*, 3 C. B. 349, 379. *Milsom* v. *Awdry*, 5 Ves. 466. *Shanley* v. *Baker*, 4 Ves. 732. 1 Jarm. Wills, (5th Am. ed.) 747, note *q*. 2 Roper, Legacies, (2d Am. ed.) 1502.

If the words "shall in like manner receive the said rents, interest, and profits to her own use and for the education and support of my said grandchildren at her discretion," mean to apply at her discretion, by analogy to the discretion given her husband, the fund to be applied should be co-existent with the power to apply, during her widowhood, and allowed to accumulate when not needed for the specified uses. The direction to her husband is not to pay over, but that it should be received by him to be applied, whereby is signified the intention of the testator that the income as such should accumulate, in lieu of conferring a right upon his grandchildren to maintain an action therefor in assumpsit against their mother, as for a debt. *Hinckley* v. *Williams*, 1 Cush. 490, 493. If the direction means to receive and apply at discretion, the son's wife did not hold the rents and profits, or income, absolutely, but in trust; and the grandchildren can enforce its due appropriation in part for their benefit in equity, although they are not resident with their mother. *Whiting* v. *Whiting*, 4 Gray, 236. *Chase* v. *Chase*, 2 Allen, 101. *Williams* v. *Bradley*, 3 Allen, 270, 278. *Warner* v. *Bates*, 98 Mass. 274, 280. *Parker* v. *Parker*, 126 Mass. 433, 437. 1 Jarm. Wills, 399. Gray, Restraints on Alienation, §§ 116, 155 *et seq.*

"A legacy to a parent upon trust to be by him applied, or in trust for the maintenance and education of his children, will certainly give the children a right in a court of equity to enforce their natural claims against the parent in respect of the fund on which the trust is declared." Per Wigram, Vice-Chancellor, in *Thorp* v. *Owen*, 2 Hare, 607. If Ann C. Paine is to receive the income to be applied at her discretion for the specified uses, then she is to retain it in her own hands for such application, by the same analogy, and the duration of such retention is her life

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or widowhood. The gift of the accumulated rents and income is in violation of a direction to retain in her own hands the rents and income for application. A person having a power must execute it *bona fide* for the end designed; and that an exercise of the power otherwise is corrupt, and void in equity, is a well established rule. *Aleyn* v. *Belchier*, 1 Eden, 132; *S. C.* 1 White & Tudor's Lead. Cas. in Eq. (6th ed.) 437 and notes.

II. The meaning of the reservation to Ann C. Paine must be gathered from the context, and so construed as to avoid repugnancy, and to harmonize and give effect to all parts of the will. If the reservation is repugnant to the trust by which she is imperatively directed to receive the income to her own use and for the education and support of the testator's grandchildren, the trust should prevail, as the later indication and more certain statement of the final intention of the testator. *Bowers* v. *Porter*, 4 Pick. 198, 210. *Homer* v. *Shelton*, 2 Met. 194, 206. 1 Jarm. Wills, 472 and note 1. If the reservation is construed as a grant to her, it is like a grant followed by an habendum upon trusts, no part of which is repugnant to the other. The words "and to this end" point to this construction as in harmony with the testator's intention.

The unlikelihood that the testator should wholly suspend the provision for the support and education of his grandchildren during the widowhood of his daughter-in-law, which might occur at a time when they would most need it, and of necessity would occur when the support of their father was withdrawn, is strong evidence that a trust was intended for the grandchildren during their mother's life.

The provision that trustees other than the testator's son and son's wife are to pay over the net income to the joint order of said son and his wife, and to the order of the survivor, "to be by them appropriated as is before provided," shows that the testator intended them to receive it solely upon the trusts expressed, and upon its receipt it was to be by them so appropriated *Blake* v. *Dexter*, 12 Cush. 559, 568.

III. The right to occupy rent free a part of the land, uncertain in extent as to what part, of doubtful location till determined by actual occupancy, and dependent for duration upon such occupancy, does not include the right or title to the rents of other

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parts of the same land not actually occupied, or the income of the proceeds of such other parts when sold. The devise is not of the "free use" of the land, or the "use and occupation" of land, but is confined to personal occupancy. *Willmarth* v. *Bridges*, 113 Mass. 407. 1 Jarm. Wills, 798.

IV. Under the will of Frederick William Paine, the gift of the residue to his wife, "to be at her sole use and disposal," is absolute, and the fact that he acquainted his wife with his reasons for the gift does not change it. But the words, "and will by her own last testament do what is right and just to my children and their natural heirs," impose a trust, and limit his wife to a testamentary disposition of his property to the testator's children. The words are not, "I desire and hope that he will so provide by will or otherwise," as in *Hess* v. *Singler*, 114 Mass. 56, 59; or, "I wish my beloved wife, when she dies, to give," as in *Barrett* v. *Marsh*, 126 Mass. 213, 216; or, "I wish, at the death of my wife, that she should make an equal division," as in *Sears* v. *Cunningham*, 122 Mass. 538; or, "I assume that they" (the younger brothers) "on their part will not fail to do for him" (the older brother) "and his family all that in the circumstances the truest fraternal regard may require them to do," as in *Rose* v. *Porter*, 141 Mass. 309; and the case is stronger than *Warner* v. *Bates*, 98 Mass. 274, 277, where the words were, "in the full confidence that he will," &c., where a trust was held.

The words state the result of an undisclosed agreement between the testator and his wife, are obligatory, and such agreement to make a will in favor of their children need not be in writing *Glass* v. *Hulbert*, 102 Mass. 24, 39; *Nichols* v. *Allen*, 130 Mass. 211, 213; *Olliffe* v. *Wells*, 130 Mass. 221, 224; *Wellington* v. *Apthorp*, 145 Mass. 69; 2 Story Eq. Jur. § 1068; they denote at least a confidence or trust committed to his wife, and bring the case within the principle in 2 Sugden, Powers, (3d Am. ed.) 172, 173; *Wright* v. *Atkyns*, 17 Ves. 255; *Coates' appeal*, 2 Penn. St. 129; *Collins* v. *Carlisle*, 7 B. Mon. 13; *Bull* v. *Bull*, 8 Conn. 47; they are imperative, and not precatory or discretionary; 1 Sugden, Powers, 537. See *Robinson* v. *Smith*, 6 Madd. 194; *Malim* v. *Keighley*, 2 Ves. Jr. 333.

The trifling sums given his children outright, coupled with

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the statement that he had acquainted his wife with the motive or reasons for the gift of the residue to her, and his further provision for his children after his wife's death, point to a trust. The conveyance in fee is in harmony with this construction, enables the wife to carry out his direction by will, and gives effect to the trust clause. If the words "natural heirs" are used to distinguish the objects of his bounty from legal heirs, it is an estate of inheritance limited to heirs of a particular class and an estate tail, which is lawful for the testator to create, and does not defeat the estate of the children. *Wight* v. *Thayer*, 1 Gray, 284. The trust is not contrary to the statute forbidding perpetuities; *Lovering* v. *Worthington*, 106 Mass. 86, 88; and if it were, the trust is valid if its execution is kept within proper bounds. *Brattle Square Church* v. *Grant*, 3 Gray, 142. *Slark* v. *Dakyns*, L. R. 10 Ch. App. 35, 39. The trust is not to will his estate amongst his children, or to such as she may select, but to do what is right and just to all by will.

If this construction is correct, the case falls within the principle of *Aleyn* v. *Belchier*, *ubi supra*, and to protect the property for those ultimately entitled equity has jurisdiction. 1 Perry, Trusts, §§ 249, 250.

W. S. B. Hopkins, for the defendants.

HOLMES, J. This is a bill in equity seeking to establish a trust in favor of the plaintiff, under her grandfather's will, in respect of the income of the residue given to the defendant Ann C. Paine during her widowhood, and for the education and support of her children at her discretion. We shall assume that the plaintiff has a standing to maintain a bill, so far that, if it were shown that Mrs. Paine had not exercised in good faith the discretion given to her, this court might interfere. *Wilson* v. *Wilson*, 145 Mass. 490. But, in the absence of bad faith, we are of opinion that the testator's grandchildren have no equitable interest or title in or to the rents, income, and profits given to Mrs. Paine, unless and until she exercises her discretion in their favor, and that, so far as appears, Mrs. Paine was entitled to appropriate the whole to her own use, as she has done.

The testator begins by stating his desire that the residue of his property should be secured for the benefit of his grandchildren, the children of his son Frederick William Paine,

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"reserving the use of the personal property and the net income of the real estate to Ann C. Paine, wife of said Frederick, during her life and widowhood, upon the contingency of her surviving her said husband." Under these words, the gift to Mrs. Paine during her widowhood is as much a part of the testator's expressed desire as that to his grandchildren, and it is a gift of the beneficial interest. He next proceeds, "and to this end I give," &c., to his son in trust. The words "to this end" mean to the end of carrying out the above expressed desire in all its parts; and it is in the light of this statement of the general purpose that the following provisions are to be read.

The trusts are, first, that "the said Frederick shall annually receive the rents, interest, and profits of said estates, and, after deducting the necessary expenses, &c., ... shall retain the balance in his own hands, to be applied by him at his discretion for the support, maintenance, and education of the children of the said Frederick and his present wife, Ann C. Paine," &c. The will then goes on, "and in the event of the decease of my said son, his said wife, so long as she shall survive him and continue his widow, shall in like manner receive the said rents, interest, and profits to her own use and for the education and support of my said grandchildren at her discretion."

It is argued that the words "shall in like manner receive" mean that Mrs. Paine is to take upon the same trust as her husband, — that is, that the words "in like manner" qualify not only "receive," but also "to her own use" and what follows. But we think that, so far as they are more than a vague rhetorical introduction to the ensuing clause, they have no effect on any word except "receive." Looking back to the directions referred to, we think that only so much of these are meant as point out how Mr. Paine shall "receive" the rents, &c., and deduct expenses; not the subsequent directions to "retain" and "apply" the balance. Mrs. Paine cannot receive the income to her own use in like manner as her husband. It is not stated expressly that he shall receive it to his own use at all; and if she were to do so, as he did, the words would be inserted merely to arrest the legal title in her and leave her a dry trustee, whereas she is not to have the legal title after her husband's

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death, but the will provides that a trustee shall be appointed by the Probate Court.

The words "to her own use" plainly mean that Mrs. Paine is to have a beneficial interest in the fund, as is further shown by the provision that on her second marriage the trustee shall hold to the use of the grandchildren. The following words mean just what they would have meant if the order had been changed, and they had read, "and, at her discretion, for the education," &c. If there were nothing in the will before the gift to Frederick, the husband, in trust, we should feel compelled to construe it as we have done; but when we see in addition that our construction carries out what the testator just before has declared to be his desire, we cannot feel any very serious doubt about the case. The provision is a most natural one, and it may be presumed that the testator was satisfied that he could leave the support and education of his grandchildren to their mother with safety. See *Hess* v. *Singler*, 114 Mass. 56; *Sears* v. *Cunningham*, 122 Mass. 538; *Barrett* v. *Marsh*, 126 Mass. 213; *Lambe* v. *Eames*, L. R. 10 Eq. 267; *S. C.* L. R. 6 Ch. App. 597; *In re Hutchinson & Tenant*, 8 Ch. D. 540; *In re Adams & Kensington Vestry*, 24 Ch. D. 199; *S. C.* 27 Ch. D. 394; and cases below.

The direction that the testator's son or his wife shall not be held to account for property personally occupied, does not affect the construction of the previous provisions. But for it, the son as trustee would be bound to account for such property. The wife receives from it an indirect authority to occupy, which, not being the trustee, she would not have otherwise; and she is exonerated from going through the form of accounting to the trustee, who, if she went through that form, would account to the court by paying back to her what he had received.

The direction that proceeds of conveyances of real estate shall be applied solely for the improvement of the testator's estates, or for the education and support of his grandchildren, concerns the capital, which goes to the grandchildren.

The complainant makes a further claim under the will of her father, the residuary clause of which is as follows: "I give to my wife, Ann C. Paine, all the rest of my estate, whatever the same may be, to be at her sole use and disposal. My said wife is fully acquainted with my reasons for this disposal of my

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estate, and will by her own last testament do what is right and just to my children and their natural heirs." The last words do not create a trust, but state the motive for not doing so. They express the testator's confidence that his wife will do what is just of her own motion, as a reason why he leaves the property to her unfettered disposition. See cases *supra*. *Thorp* v. *Owen*, 2 Hare, 607, 617. *Mussoorie Bank* v. *Raynor*, 7 App. Cas. 321. *Bill dismissed.*

LEMUEL CLARK, administrator, & others, *vs.* FLORA M. HOLBROOK & another.

Suffolk. February 1, 1888. — March 3, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Bond — Administrator — Action — Equity — Heir — Real Estate — Equitable Attachment — Practice — Parties to Action — Misjoinder — Amendment.

A bond for support is not extinguished because the obligor's administrator is also the obligee's administrator, who in his latter capacity may sue the obligor's heir for sums that he could not in his former capacity use for the obligee's support.

The administrator of the obligor on a bond for support being ordered to retain a sum in his hands for such support unless a bond was given to expend it for that purpose, the guardian of the obligor's heir gave bond, and the sum was so expended, proving insufficient. The administrator and various creditors of the obligee thereupon brought a bill in equity against the heir and the guardian to reach and apply the obligor's real estate in payment of their claims. *Held*, on demurrer, that the administrator's remedy was by an action at law on the bond, and that of the creditors, if any, by charging the heir as trustee in a proceeding against the administrator. *Held, also*, that the misjoinder was a formal defect that might be cured by amendment.

BILL IN EQUITY, by the administrator and various creditors of Ruth Holbrook, against the sole heir of Joel Holbrook, and her guardian, to reach and apply to the payment of their claims certain real estate conveyed to Joel Holbrook upon his giving a bond conditioned to provide "all things necessary" for the "convenience, comfort, and necessity" of Ruth Holbrook so long as she might live. The defendant demurred to the bill for want of equity. At the hearing in the Superior Court the

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demurrer was sustained and the bill dismissed; and the plaintiffs appealed to this court. The facts appear in the opinion.

J. V. Beal, for the defendants.

N. C. Berry, for the plaintiffs.

HOLMES, J. Joel Holbrook executed a bond to his mother, Ruth, conditioned for her support, and afterwards died in her lifetime. Lemuel Clark was appointed his administrator, and on Ruth's petition was ordered to retain the money remaining in his hands, namely, $710.45, for her support, unless bond was given to expend the same in support of her if necessary. Lydia Holbrook, guardian of Joel's only child, Flora, thereupon gave bond. The sum was expended for the purpose mentioned, but was not sufficient. Ruth died, Clark was appointed her administrator, and the question which is intended to be presented, and which counsel desire us to consider, is whether, as such administrator, he can reach the real estate of Joel in a suit against Joel's heir.

The fact that Clark, when appointed administrator of Ruth, the obligee, was already the administrator of Joel, the obligor, did not extinguish the bond, nor prevent a suit by Clark against Joel's heir for whatever sums Clark could not have appropriated to Ruth's support as Joel's administrator. Y. B. 12 Hen. IV. 21, pl. 11. *Woodward* v. *Darcy*, Plowd. 184, 185. *Wankford* v. *Wankford*, 1 Salk. 299, 304. See *Cock* v. *Cross*, 2 Lev. 73; *S. C.* 3 Keb. 116, and 1 Freem. 49.

We are of opinion that Clark's right to proceed against Joel's heir was not extinguished by what took place in the Probate Court. Assuming that § 8 of the Gen. Sts. c. 97, (Pub. Sts. c. 136, § 13,) applies to such a case as this, that section looks to the executor's retaining assets already in his hands. It does not contemplate the court's ordering him to sell real estate to meet the liability when it shall accrue. Still less does it contemplate such a sale to meet the chance of a liability which may never be incurred. Therefore it is not intended to bar a resort to the real estate in case the personal estate is retained and exhausted.

Turning to the sections which regulate the liability of heirs, the right to recover against them is given by the Gen. Sts. c. 101, § 32, to "a creditor whose right of action accrues after

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the expiration of said time of limitation, and whose claim has not been presented to the Probate Court, or if presented has not been allowed." (§ 27 of the Pub. Sts. c. 136, reads "whose claim could not legally be presented." *Pratt* v. *Lamson*, 128 Mass. 528.) It is plain that a claim which could not be allowed or provided for in full, as it turns out, for the reasons which we have mentioned, is within the spirit, if not within the letter, of this section, and it is within the letter of § 31 (Pub. Sts. c. 136, § 26), which expresses the general intent of the following provisions. By that section the heirs "shall be liable, in the manner provided in the following sections, for all debts which could not have been sued for against the executor or administrator, and for which provision is not made in chapter ninety-seven," which we have just considered.

Whatever might have been the effect if a bond had been given for the payment of the demand, as provided in Gen. Sts. c. 97, § 8, in this case, according to the bill, the bond was only to expend the $710.45 for Ruth's support. That has been done, the condition of the bond has been satisfied, and whether or not a claim the existence of which is contingent on the claimant's remaining alive is within the provisions of § 8, and whether, if that section applied, it was followed or not by giving such a bond as is alleged to have been given, the parties now stand exactly as if no bond had been given, and the money had been retained and spent.

There are some defects in the proceedings which will make it necessary to sustain the demurrer; but as they seem to be only formal, they may be cured by amendment. The plaintiffs and their several causes of action are improperly joined; and Clark, the principal plaintiff, has no standing in equity. Clark's claim is a right to sue at law upon the bond. The liability of heirs is now governed wholly by statute. *Grow* v. *Dobbins*, 128 Mass. 271. *Grow* v. *Dobbins*, 124 Mass. 560. *Hall* v. *Bumstead*, 20 Pick. 2. *Royce* v. *Burrill*, 12 Mass. 395. But, as at common law, it is a liability upon the contract of their ancestor. *Valentine* v. *Farnsworth*, 21 Pick. 176. *Russ* v. *Alpaugh*, 118 Mass. 369, 379. Gen. Sts. c. 101, §§ 31 *et seq.* Pub. Sts. c. 136, §§ 26 *et seq.* See *Norcross* v. *James*, 140 Mass. 188, 189. In this case there is only one person liable for the debt, and there-

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fore the jurisdiction in equity given by the Gen. Sts. c. 101, § 34, (Pub. Sts. c. 136, § 29,) does not exist. On the other hand, the other plaintiffs have no right of action on the bond, or otherwise directly against the heir. Their only rights, if any, are severally to charge the heir as trustee in a proceeding against Clark.

Again, Clark's right is only to recover the amount reasonably necessary for the "convenience, comfort, and necessity" of Ruth so long as she lived, in excess of what has been paid by Joel's estate. The bill does not allege in terms that any sum above what was paid was necessary. The debts incurred by Ruth, and alleged to be due, may or may not be evidence of the amount necessary for her support, but they are nothing more.

Demurrer sustained.

GEORGE M. BAKER *vs.* JOSEPH D. BROWN & others.
MOSES E. ROWE *vs.* SAME.

Middlesex. February 1, 2, 1888. — March 3, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Will — Married Woman — Husband — Support — Creditor — Equitable Attachment.

A married woman, alleged to be possessed of realty "of the value of $10,000 and other real and personal property of a value to the plaintiff unknown," by her will, gave pecuniary legacies amounting to $2,100 to two married daughters and to her son, who was her executor, and, after expressing a desire that her husband should be supported out of her property, left the residue of her estate to two adult unmarried daughters subject to the condition that they "support their father during his life." *Held*, that the husband had no interest under the will which a creditor could reach by a bill in equity under the Pub. Sts. c. 151, § 1, cl. 11.

TWO BILLS IN EQUITY, under the Pub. Sts. c. 151, § 1, cl. 11, to reach and apply, in payment of debts due to the plaintiffs from Joseph D. Brown, his interest in the residue of the estate of his wife, Lucy R. Brown. The bills alleged the following facts.

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The plaintiff in the first case recovered judgment against Joseph D. Brown, on October 17, 1884, for the sum of $545.39, damages and costs, no part of which had been paid; and the plaintiff in the second case recovered judgment against him on June 26, 1882, for $160.45, damages and costs, of which only $8.72 had been paid.

Lucy R. Brown, who was seised of real estate in this Commonwealth "of the value of $10,000 and other real and personal property of a value to the plaintiffs unknown," died on March 24, 1886, leaving a will, which was duly admitted to probate, and which, with the exception of parts merely formal, was as follows:

"I give to my daughters Lucy R. Vialle and Elizabeth Worthley $1,000 each. I give to my son Joseph D. Brown, Jr., one hundred dollars. It is my desire that my husband should have his support out of my property during his life; therefore all the rest residue, and remainder of my estate both real and personal, after the payment of my just debts, funeral charges, and the legacies before named, which are to be paid within six months after my decease, I give and devise to my daughters Abby Brown and Mary Brown, and their heirs and assigns forever, subject to the condition that they support their father during his life. I hereby nominate my son Joseph D. Brown, Jr., to be the executor of this my last will and testament; as witness my hand and seal this 12th day of June, A.D. 1883."

Abby Brown and Mary Brown "accepted the above recited devise and bequest of Lucy R. Brown," and "Joseph D. Brown, under and by virtue of the said will, became entitled to a property right, title, or interest, legal or equitable, in the property and estate of said Lucy R. Brown, which cannot be come at to be attached or taken on execution in a suit at law against said judgment debtor."

The prayer of each bill was that Abby Brown and Mary Brown might be restrained from alienating the interest of Joseph D. Brown; that they might be ordered to pay to the plaintiffs sums equivalent to his support during his lifetime and until the debts were paid; and for general relief.

The defendants, Joseph D. Brown, Abby Brown, and Mary Brown, demurred to the bills for want of equity, and on the ground that Joseph D. Brown had no interest in his wife's

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estate that could be applied to the payment of the plaintiffs' debts; and the remaining defendant, Joseph D. Brown, Jr., demurred to the bills for want of equity, and because he was not a proper party. At the hearing before a single justice, the demurrers were sustained and the bills dismissed; and the plaintiffs appealed to the full court.

Samuel Hoar, for the defendants.

E. G. Loomis, for the plaintiffs.

C. ALLEN, J. It was decided in *Broadway National Bank* v. *Adams*, 133 Mass. 170, that the founder of a trust may secure the income of it to the object of his bounty, by providing that it shall not be alienable by him, or be subject to be taken by his creditors. Such provision need not be in express terms, but it is sufficient if the intention is clearly to be gathered from the instrument, when construed in the light of the circumstances. The only question in the present case is, whether enough appears to show such intention.

The existing circumstances are not so fully disclosed as might be wished, but it appears that the testatrix was a married woman, possessed of real estate in this Commonwealth of the value of ten thousand dollars; the averment of other property is too vague to be considered as of any significance; and in her will she expressed her desire that her husband should have his support out of her property during his life, and therefore, after giving $2,100 in pecuniary legacies to other persons, she gave all the residue of her estate to two daughters, subject to the condition that they should support their father during his life. In one of the two cases now before us, it appears that the plaintiff recovered a judgment against the husband for about $160, a year before the will was executed, on which less than nine dollars had been paid; in the other case, it does not appear when the plaintiff's claim accrued. There is no averment in either case that the real estate was income producing, or that the husband had any property, income, business, or means of support, except from his daughters.

In the absence of anything to show the contrary, it may fairly be inferred that the daughters upon whom this duty of supporting their father was cast were of age, and that they were unmarried and lived with their parents. They retained their maiden names. There is nothing to show how much the estate would be dimin-

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ished by the debts which are referred to in the will, and by the funeral charges and expenses of administration. The residue must necessarily be quite moderate in amount. The will does not provide that the income of this residue shall be paid to the beneficiary, or devoted in whole to his use; there is no provision for the payment of any money at all to him; but his daughters are to support him. His age is not given, but he had five children, two married daughters, a son old enough to be appointed executor of the will, and the two daughters to whom the residue was given. In the absence of any averment to the contrary, it is a fair inference that he was pretty well along in years, poor, and dependent upon the support to be furnished by his daughters. There was probably some good reason why no bequest was made directly to him; it may have been his age, infirmity, incapacity, condition of indebtedness, or other reason not disclosed. It is sufficiently apparent that the testatrix intended that the trust imposed upon her daughters should be discharged by them personally, by furnishing to their father from time to time food, clothing, fuel, shelter, medicines, care, and nursing, as he might need them, and probably this support was to be furnished on the premises where they all lived. Assuming it to be true that they lived in a house owned by the testatrix, the case would be stronger for implying that the support was, in their option, to be there furnished, than in *Parker* v. *Parker*, 126 Mass. 433, or *Dwelley* v. *Dwelley*, 143 Mass. 509, in both of which cases it was held that the beneficiary had no right to demand a support elsewhere.

Clearly, the beneficiary has no right to the income of the devised estate, which he can control, but, to use the language of Lord Hatherley, the trustees are to apply the same, "with their own hands, as it were," to the use of their father. *Chambers* v. *Smith*, 3 App. Cas. 795. The amount to be devoted to his support, and the manner of applying it, by continuing or receiving him as a member of their own household, by personal care and attention to his wants, or otherwise, rest wholly in their discretion, so long as they do not abuse their trust. Under this state of things, a court of equity will not put a valuation upon his necessary support, and order his daughters to pay it over to creditors, leaving him, it may be, to be supported by

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charity or by the town. A creditor's claim is not so high as that. *Broadway National Bank* v. *Adams*, *ubi supra*, and cases there cited. See also *Thackara* v. *Mintzer*, 100 Penn. St. 151; *Steib* v. *Whitehead*, 111 Ill. 247; *Lampert* v. *Haydel*, 20 Mo. App. 616; *Chambers* v. *Smith*, 3 App. Cas. 795, 806, 807, 811, 812. *Bills dismissed.*

JOSIAH G. BRIDGE, executor, *vs.* PHILINDA BRIDGE.

Middlesex. February 2, 1888. — March 3, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Will — Annuity — Capital and Income — Executor — Probate Court — Appeal — Master.

A testator gave to his wife an annuity of $400, "if the income of my estate not herein bequeathed to her or to the payment of said debts and funeral expenses shall amount to that sum," and left her the use of "the house in which we now live" for life, but requested his executor to furnish her with a suitable house elsewhere if she desired. The widow continued to live in the house, and the executor deducted from the gross income, applicable to the payment of the annuity, the amount paid out for repairs, taxes, water rates, insurance, and interest on a mortgage on the house. *Held*, on an appeal from a decree of the Probate Court allowing the executor's account, that the annuity was to be paid out of net income, and that the deductions were rightly made.

General expenses of administration incurred for the benefit of the whole estate are chargeable to capital, and not to income.

If a master on such an appeal declines to revise the compensation allowed to the executor, his report will be recommitted if the appellant so desires.

A stable in the rear of the house occupied by the testator, which was used by him in connection with it, was let by the executor, and the widow claimed the rent. The master did not set forth very clearly the connection between the house and the stable, nor whether he excluded the claim because the words "house in which we now live" could not include a stable, or on a finding that it was not so connected with the house as to pass with it. *Held*, that the testator's use did not necessarily establish that the quoted words included the stable, and that it could not be said that the master was wrong.

APPEAL, by Philinda Bridge, from a decree of the Probate Court, allowing the accounts of the surviving executor of the will of her husband, Abel E. Bridge. The will contained the following provisions, which alone are material:

"I give and bequeath to my wife Philinda four hundred dol-

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lars a year during her natural life if the income of my estate not herein bequeathed to her or to the payment of said debts and funeral expenses shall amount to that sum.

"I give and bequeath to my said wife Philinda the use of the house in which we now live to be occupied by her during her natural life unless she shall otherwise elect. If she should desire to live elsewhere I request my executors to furnish her a dwelling-house such as will be suitable to her welfare and comfort. . . .

"I hereby direct my said executors to use any income of my said estate and any accumulation of personal property in their hands in excess of the legacies and provisions hereinbefore made in paying and cancelling the mortgages so long as any exist, on my real estate. When my said wife Philinda shall have deceased I authorize my said executors and empower them to sell and convey by public or private sale the part of my said real estate then remaining unsold whenever after said decease of my wife such sale can be made to advantage. And I direct my said executors on and after the decease of my said wife to pay to my son Josiah G. Bridge the income of one third of my entire estate then remaining till such time as such one third part can be set off or paid to him which I direct to be done as soon after the death of my wife as may be.

"Out of the balance of said estate after my son Josiah has received one third thereof as above provided I direct that two thousand dollars shall be held in trust by my said executors and so invested as to draw a reasonable and safe income which I direct my said executors to pay yearly to my daughter Emily, and that one thousand dollars out of said balance be similarly invested and the income thereof paid yearly to my daughter Vesta by said executors and trustees thereof hereby duly appointed for the purpose. . . .

"At the death of my said wife, excepting said trusts and said provision for the heirs of said Emily, all the rest and residue of said estate I give and bequeath to my son Josiah G. and to his heirs.

"I also hereby make and create the said Josiah G. Bridge and the said Thomas B. Harris trustees of that part of said estate not herein disposed of by legacies, during the life of my wife

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Philinda, so far as it may be necessary in carrying out the provisions of this will."

The case was referred to a master, who reported, in substance, that Philinda Bridge continued to live after the death of the testator in the same part of a double house, owned by him, which they had previously occupied; that the executor, before paying to her the $400 a year given her by the will, deducted from the gross income of the estate, and was allowed in his account, amounts paid out for repairs, taxes, water rates, insurance, and interest on a mortgage on the house; that the executor further deducted from the gross income, and was allowed in his account, the charges for the settlement of the estate, his commissions on collections, his attendance at court, and disbursements to counsel; and that from the net income thus produced the executor paid to the widow a sum less than $400 a year.

The master also stated in his report, that the appellant contended that the executor had charged the estate with commissions upon money collected from himself, and for his services in settling the estate, for attendance upon court, and for payments to counsel, which should not have been allowed; but "these matters seem to me so much within the better knowledge and discretion of the judge of the Probate Court that I decline to revise them."

The report of the master then proceeded as follows: "The appellant further claims, that, by the above quoted clause of the will which gives her the use of the house, she is entitled to the use of the stable within its curtilage. This stable, with an annexed hennery, is in the rear of the block of two houses, of which one is the same mentioned in the will, for the widow. It was used by the testator, from the time of its erection to the date of his death, in connection with the house occupied by himself and the appellant. The houses front on Alder Street and the stable fronts on Beach Street, the house occupied by the appellant being the one at the corner of the two streets; the space between the rear entrance of this house and the stable and Beach Street is concreted. The other house has always been occupied by a tenant, and its lot has no entrance to the stable. The two houses have no entrance in common, and their respective grounds are separated by a high, close fence, which runs to the stable.

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The lot on which the buildings stand extends about one hundred feet on Alder Street and one hundred and thirty feet on Beach Street. The executor has rented the stable, and during the time covered by his accounts has collected therefor two hundred and eleven and fifty one-hundredths dollars ($211.50). This amount the appellant claims should have been paid to her. As I do not consider that the devise of the use of the house carries with it the use of the stable, I disallowed this claim of the appellant."

The master further reported, that the net income as found by the Probate Court should be revised by adding thereto the deductions made by the executor out of the gross income, and that the executor should pay to the appellant the balance due to her upon her annuity.

Hearing upon the master's report, and exceptions of both parties thereto, before a single justice, who ordered the decree of the Probate Court to be affirmed, and the case to be recommitted; and this appeal was taken to the full court.

E. A. Alger, for the executor.

C. Abbott, for the appellant.

HOLMES, J. This is an appeal by the widow of Abel E. Bridge from a decree of the Probate Court allowing the accounts of her husband's executor.

1. The first question arises under the following clause of the will: "I give and bequeath to my wife Philinda four hundred dollars a year during her natural life if the income of my estate not herein bequeathed to her or to the payment of said debts and funeral expenses shall amount to that sum." The testator also gives her the use of his house for life, or, if she should desire to live elsewhere, requests his executor to furnish her a suitable house. She has continued to live in his house, and the executor deducts from the gross income applicable to payment of the four hundred dollars the amount paid out for repairs, taxes, water rates, insurance, and interest on a mortgage on the house. This is plainly right; the gift is of four hundred dollars a year, if the net income amounts to that sum. The charges mentioned all fall on income, not on capital, unless the will directs otherwise. *Watts* v. *Howard*, 7 Met. 478, 482. *Parsons* v. *Winslow*, 16 Mass. 361, 368. *Sohier* v. *Eldredge*, 103 Mass. 345, 354. *Plympton* v. *Boston Dispensary*, 106 Mass. 544, 547. We see nothing in this

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will to indicate that the usual rule is not to be applied. The case is not like *Smith* v. *Fellows*, 131 Mass. 20, where a gift of "one thousand dollars per year during her lifetime, the same to be paid from the income of my property," was held to be an absolute gift of the sum named, payable out of principal if necessary, and therefore payable out of gross income. The gift here is payable only from income, and the income available must be ascertained in the ordinary way.

2. The general expenses of administration should fall upon the corpus of the estate, as they are incurred for the benefit of the whole estate. See *Sawyer* v. *Baldwin*, 20 Pick. 378, 388; *Brown* v. *Kelsey*, 2 Cush. 243, 249. The decree of the Probate Court erred in charging them to income.

3. There is no doubt that, where an executor's final account comes to this court by appeal, the compensation allowed him is subject to revision, as well as the other items. *Blake* v. *Pegram*, 109 Mass. 541. Pub. Sts. c. 144, § 7; c. 156, §§ 5, 6, 17. The master having declined to revise this matter, the report must be recommitted if the appellant desires, upon this single point. If it be true, which does not appear, that a commission is allowed the executor for collecting his own debt, the allowance is improper. But possibly, if such an allowance was made, it was considered in determining the other compensation allowed, and it may be thought proper to increase that by a corresponding amount, leaving the total compensation the same. There is nothing in the facts now appearing to indicate that the allowances for attending court and for counsel fees were improper. Pub. Sts. c. 144, § 7. *Edwards* v. *Ela*, 5 Allen, 87. *Forward* v. *Forward*, 6 Allen, 494. *Blake* v. *Pegram*, *ubi supra*. *Turnbull* v. *Pomeroy*, 140 Mass. 117, 118.

4. There is a stable in the rear of the house occupied by the testator, which was used by the testator in connection with the house. The executor has let it and the appellant claims the rent. The mode of use in the testator's lifetime does not necessarily establish that the stable is included in the words "house in which we now live." 2 Wms. Saund. 401, n. 2. The connection between the house and stable is not set forth very clearly, nor does it appear very clearly whether the master excluded the allowance of the rent for the stable on the ground that, as matter

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of construction, the words could not include a stable, or on a finding that the stable was not so connected with the house as to pass with it. On the facts appearing, we cannot say that the master and judge of probate were wrong. It is unnecessary to consider whether in any case the widow would have had any other right than personally to occupy the stable if so minded.

Decree accordingly.

ELIAS HAM *vs.* THOMAS KERWIN.

Suffolk. February 2, 1888. — March 3, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Promissory Note — Signature — Special Denial — Amendment — Exceptions.

The special denial of the genuineness of the signature to a written instrument, required by the Pub. Sts. c. 167, § 21, if imperfect, is amendable within the judicial discretion, to which no exception lies.

CONTRACT upon a promissory note purporting to be signed by the defendant. The defendant's testatrix, who was admitted to prosecute the action, filed an answer, which, after a general denial, proceeded as follows: "And further answering, defendant denies the genuineness of the signature to the note declared on, and says that if any such note was made, and she denies that any such note was made by the testator during his lifetime, the same has been paid in full."

At the trial in the Superior Court, *Blodgett*, J., ruled that the answer was not sufficient, under the Pub. Sts. c. 167, § 21, to require the plaintiff to prove the genuineness of the signature, and the defendant thereupon moved to amend the answer so that it should read, the defendant "denies the genuineness of the signature thereof, and demands that it shall be proved at the trial." The plaintiff asked the judge to rule, as matter of law, that the amendment could not be allowed; but the judge declined so to rule, and allowed the amendment.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

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J. F. Wiggin & B. M. Fernald, for the plaintiff.

P. B. Kiernan, for the defendant.

MORTON, C. J. Our statutes of amendments are very broad in their spirit and scope, allowing amendments at any time before judgment in a civil suit, in any matter either of form or substance, in any process, pleading, or proceeding in the suit which may enable the plaintiff to sustain the action or the defendant to make a legal defence. Pub. Sts. c. 167, §§ 41–44.

The special denial of the genuineness of the signature to a written instrument declared on, required by the Pub. Sts. c. 167, § 21, if not in strictness a part of the pleadings, is an important proceeding in the case. It is to be filed "within the time allowed for an answer," which by leave of court may be at any time before trial. It falls within the letter and the spirit of the statute, and if the special denial is imperfect we can have no doubt that it is within the power of the court to allow an amendment to the same extent that it might allow an amendment to an answer, and upon such terms as it deems reasonable. Such an amendment is within the discretion of the court, and no exception lies to the exercise of this discretion.

Exceptions overruled.

CATHERINE MAGUIRE, administratrix, *vs.* FITCHBURG RAILROAD COMPANY.

Suffolk. January 17, 1888. — March 5, 1888.

Present: MORTON, C. J., DEVENS, HOLMES, & KNOWLTON, JJ.

Railroad — Loss of Life — Negligence — Due Care — Evidence.

A laborer employed in a grain elevator, while assisting in unloading a railroad car, the brakes of which were set, was killed by other cars coming violently against it and forcing it from its position. In an action against the railroad, under the Pub. Sts. c. 112, § 212, it appeared that the car stood upon a single track, and filled, with the exception of eight inches, all the space between a platform and the side wall of the building; that the grain was being shovelled into hoppers under this platform; that it had been a part of the laborer's duty to sweep the loose grain falling on or near the track into the hoppers; that just before the accident, being dismissed from another part of the work, he took a broom and

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disappeared; and that after the accident he was found dead near the track with the broom. *Held*, that the jury might infer that he was in the exercise of due care when the accident occurred. *Held, also*, that evidence of his sweeping loose grain into the hoppers on former occasions was admissible to show the character of his employment.

TORT by the administratrix of the estate of Daniel Maguire, for causing his death in the elevator of the Hoosac Tunnel Dock and Elevator Company, in Charlestown. Trial in the Superior Court, before *Bacon*, J., who, after admitting certain evidence against the objection of the defendant, ruled, at its request, that there was no evidence that the intestate was in the exercise of due care at the time he was killed, and that the plaintiff could not recover, ordered a verdict for the defendant, and reported the case for the determination of this court. If the ruling was correct, or if the evidence was improperly admitted, judgment was to be entered upon the verdict; otherwise, a new trial was to be granted. The facts and evidence appear in the opinion.

H. W. Bragg and *J. A. Maxwell*, for the plaintiff.

G. A. Torrey, for the defendant, cited *Mayo* v. *Boston & Maine Railroad*, 104 Mass. 137; *Crafts* v. *Boston*, 109 Mass. 519; *Hinckley* v. *Cape Cod Railroad*, 120 Mass. 257; *French* v. *Taunton Branch Railroad*, 116 Mass. 537; *Corcoran* v. *Boston & Albany Railroad*, 133 Mass. 507; *Riley* v. *Connecticut River Railroad*, 135 Mass. 292; *Blanchette* v. *Border City Manufacturing Co.* 143 Mass. 21; *Indiana, Bloomington & Western Railway* v. *Greene*, 106 Ind. 279; *Sorenson* v. *Menasha Paper Co.* 56 Wis. 338; *Wakelin* v. *London and South Western Railway*, 12 App. Cas. 41; *Chase* v. *Maine Central Railroad*, 77 Maine, 63; *State* v. *Maine Central Railroad*, 76 Maine, 357; *Starry* v. *Dubuque & S. W. Railroad*, 51 Iowa, 419; *State* v. *Philadelphia, Wilmington, & Baltimore Railroad*, 60 Md. 555; *State* v. *Baltimore & Ohio Railroad*, 58 Md. 221; *Curran* v. *Warren Chemical Co.* 36 N. Y. 153; *Cordell* v. *New York Central & Hudson River Railroad*, 75 N. Y. 330; *The Gladiolus*, 21 Fed. 417.

DEVENS, J. The only question presented by the case is whether any evidence was offered from which due and ordinary care could be inferred on the part of the plaintiff's intestate when the injury to him occurred. He was not the servant of the defendant, but of the Elevator Company, employed to per-

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form such duties as might be assigned to him, and "to make himself generally useful." As the evidence tended to show, he was engaged in the elevator building in assisting to unload grain from two cars, which had been brought in by the defendant, the brakes of which had been set and the cars thus rendered stationary. The defendant negligently, and without reasonable warning, while this operation was being performed, sent certain other cars into the building against the stationary cars with such violence as to force them a considerable distance from their position. Immediately afterwards the plaintiff's intestate was found dead, lying across one rail of the track. The track upon which the stationary cars thus being discharged stood was a single one, laid down between a platform (covering hoppers into which the grain was shovelled from the cars) and the brick wall on the other side of the building. The cars occupied the whole space between this platform and the wall, except about eight inches on either side. During the operation of unloading, it was common for grain to fall from the cars outside the hoppers, and upon or near the track, and grain had so fallen at this time. It was the custom to sweep the grain which had thus fallen into the hoppers. It was a part of Maguire's duty, with that of the other men, to do this, and at other times he had been thus engaged.

A few minutes before the accident, he had been seen standing on the platform, attending to the regulation of feed from the hopper to the elevator belt, by which the grain was raised to the bins in the upper story, which was done by means of a small wheel regulated by hand. The assistant to the second foreman testified that he had "told him that would be enough, to leave it," and did not know where Maguire then went to. "I went to the other hopper," the witness continued, "and heard my second foreman sing out, and the cars came then just as quick as anything; the men did not get time to let go of anything when the noise was made." The assistant foreman testified: "When the cars came in, I was standing on the platform, right at the door of the car where the men were working. I did not see Maguire at that particular time. I was talking with him about two minutes before that. I don't know where he went; he had a broom in his hand; he disappeared, and I don't know

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where he went." There was therefore evidence that, after having been dismissed at the wheel, he had taken his broom for the purpose of using it, and had used it on the platform. At the precise time of the accident he was seen by no one, and when he "disappeared," as stated by the assistant foreman, it was not shown that he had stepped down on to the track, but he was there found with his broom when the accident was over.

While due care must be shown by a plaintiff in order that it may be seen that an injury to him was not occasioned by any contributory negligence on his part, it is not necessary that any positive act of care shall be proved. It may be inferred from mere absence of fault, when sufficient circumstances are shown fairly to exclude the idea of negligence on his part. If a person is in the place where he may rightfully be engaged in duties which he may properly there perform, under circumstances which do not require the exercise of especial caution on his part against the acts or the negligence of others, he is in the exercise of due care. A passenger sitting quietly in his seat in a railroad car is, so far as relates to the management of the train, in the exercise of due care. When laborers are set to work upon a railroad track upon the assurance, express or implied, that the use of such track is suspended, they are not guilty of negligence if they continue their work without constantly watching for coming trains.

In the case at bar the cars were in a building not belonging to the defendant, and were fixed there for the purpose of being unloaded. The laborers had a right to conduct that work as it was usually done, without watching constantly lest a train should suddenly be driven in, and upon the assumption that proper notice would be given of an incoming train. If after the collision the body of one of the men standing upon the cars and engaged in shovelling the grain had been found upon the ground, as if thrown down, there would have been sufficient evidence of due care from his employment when the collision took place.

The presence of the deceased on the track with his broom, as shown by the discovery of his body there, affords evidence that he was there for the purpose of sweeping. Whether he had actually begun or not is not important, if he was there for the

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purpose of commencing as soon as practicable. He had been dismissed elsewhere, and the sweeping the track was in the line of his duty. He was not bound any more than the shovellers to watch for approaching trains, but had a right to believe that the laborers upon the cars, or engaged in removing the loose grain, would not be disturbed without proper notice. The jury might well have believed that he was on the track in the performance of his duty, and in the exercise of all the care to be expected of a prudent man. If rightfully in the place of danger, it is not contended that he had any opportunity to escape.

The case is quite distinguishable from those cases where it has been held that the disclosure of the facts has been so limited that there could be no fair inference that a plaintiff was in the exercise of due care, or that the evidence was equally consistent with care or negligence on his part. If the only negligence of which deceased could have been guilty must have been that he was on the track with no rightful purpose, or under such circumstances that a prudent man would not have been there, and if the evidence and the inferences to be drawn from it tend to show affirmatively otherwise, the issue of due care may be sustained.

Without undertaking to examine in detail the numerous cases cited by the defendant, that upon which it principally relies is *Hinckley* v. *Cape Cod Railroad*, 120 Mass. 257. But that case does not sustain the defendant's contention. It was one where evidence was necessary in order to show what was the conduct of the party injured in regard to circumstances especially requiring care on his part. Without this it could not be determined whether he was or was not in the exercise of due care, and no such evidence was offered. It was said not to differ substantially from a case where the party injured might have been found lying on the ground, having been knocked down by a passing car on the railroad track, there being no evidence as to what his own conduct had been. Hinckley, who attempted to cross a side railway track in order to reach the station on the other side, as he approached a place known as Murphy's Corner, on his way thus to cross, had a view of the railway track for one hundred and fifty feet, and as he reached the track it could have been seen by him for the distance of half a mile. One Basset, who

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was some fifteen or twenty feet behind him, stopped at Murphy's Corner, and saw the car which subsequently struck Hinckley detached from the train on the main line. He called to Hinckley, but was probably not heard on account of the wind. It did not appear that Hinckley, either at Murphy's Corner, at any intermediate point, or when near the track and about to cross, exercised the precaution of looking to see whether anything was approaching. No circumstances were shown which would justify him in neglecting the usual and necessary precautions of those who are about to cross a railroad track upon which a train or a car might be approaching. In the utter absence of evidence as to what Hinckley did after the time when his conduct became a matter of importance, it was impossible to infer that he had exercised the care and circumspection properly to be demanded of him.

The case at bar differs from that class of cases in which it is necessary to show some positive act on the part of the plaintiff in order to prove that he was in the exercise of due care. The plaintiff's intestate had a right to believe, if engaged in any labor connected immediately with unloading the cars, that he would not be interfered with by a reckless incursion of the trains of the defendant. We are therefore of opinion that the inquiry whether the plaintiff's intestate was in the exercise of due care should have been submitted to the jury.

The evidence objected to by the defendant and received by the learned judge, that at other times the deceased had swept up the loose grain, was competent as showing the character of his employment. *New trial ordered.*

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AMERICAN CARPET LINING COMPANY *vs.* GEORGE W. CHIPMAN.

Suffolk. January 31, 1888. — March 5, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Equity Practice — Insolvent Debtor — Affidavit — Assignment.

If a suit in equity is heard on the bill and answer, the allegations of the answer must be taken as true where they conflict with those of the bill.

A petition for a warrant in insolvency against the estate of a debtor may be brought and sworn to by the assignor of a judgment against him, at the request and for the benefit of his assignee.

Under the Pub. Sts. c. 157, § 112, requiring a petition by a creditor for a warrant to seize the estate of an insolvent debtor to be "verified by oath," an affidavit that the allegations in the petition are true according to the best of the knowledge and belief of the affiant, is sufficient.

BILL IN EQUITY, under the Pub. Sts. c. 157, § 15, to vacate proceedings in insolvency instituted against the plaintiff upon the petition of the defendant.

The bill alleged, in substance, that a petition for a warrant in insolvency to seize the estate of the plaintiff was signed by the defendant and filed by him in the Court of Insolvency; that the petition set forth that the defendant, "who brings this petition for the use and benefit of Edward H. Bailey," was a creditor of the plaintiff, and was verified by the following affidavit, sworn to before a justice of the peace: "Personally appeared the above-named George W. Chipman, and made oath that the allegations contained in the foregoing petition are true, according to the best of his knowledge and belief"; that the defendant at the hearing in the Court of Insolvency, in order to establish his right to bring the petition, offered evidence tending to prove that he had recovered against the plaintiff a judgment, which on July 17, 1886, he had sold and assigned, by a deed of assignment in writing, to Bailey; that at such hearing "it was not claimed, and there was no evidence offered tending to prove, that the said Bailey had authorized or empowered the said Chipman to institute proceedings in insolvency against the American Carpet Lining Company, or that the said Chipman had any right or interest in the said judgment debt, or any part thereof, at any time

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after the said assignment was made as aforesaid, but it was admitted that the said Bailey was, at the time of bringing said petition and at the time of the hearing, the sole owner of said judgment debt"; that the Court of Insolvency ordered a warrant to issue against the plaintiff; and that the Court of Insolvency erred in deciding that a warrant should issue: "1. Because the said George W. Chipman was not a creditor of the American Carpet Lining Company. 2. Because said petition was not brought or signed by any creditor of the American Carpet Lining Company, either personally or by an attorney thereto duly authorized. 3. Because it did not appear that said Chipman was authorized or empowered by E. H. Bailey, who was assignee of the judgment debt, to institute proceedings in insolvency against the American Carpet Lining Company. 4. Because the said Bailey was the sole owner of the judgment debt upon which said insolvency proceedings were instituted at the time said proceedings were instituted, and was the only person legally entitled to institute proceedings in insolvency against the American Carpet Lining Company founded upon said judgment debt. 5. Because the petition in said insolvency proceedings was not verified by oath in the manner and form required by law."

The answer, so far as material, was as follows: "This defendant says that he, on the seventeenth day of July, 1886, assigned the judgment set forth in said petition to Edward H. Bailey, of New York City, authorizing him to enforce the collection of said judgment in my name, and as my attorney thereunto duly authorized, but for his own use; that the said Bailey employed Francis S. Hesseltine, counsellor at law, to institute proceedings against the plaintiff corporation in the Court of Insolvency for the county of Suffolk; and that this defendant, at the request of said Hesseltine as attorney of said Bailey, and on his advice that it was his duty by virtue of his assignment so to do, read, signed, and made oath to the said petition in insolvency; and the said petition was filed, not by this defendant, as alleged by the bill, but by said Hesseltine acting as counsel for said Bailey. That this defendant knows nothing of his own knowledge as to what proceedings took place in the Court of Insolvency upon the hearing upon said petition; that he is informed that Mr. Hesseltine, as attorney of Mr. Bailey, claimed in said court, and

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his claim was not called in question, that he was there proceeding in the name of George W. Chipman, judgment creditor, in behalf of said Mr. Bailey, and as his counsel, and that full and sufficient evidence was offered to support all the allegations in said petition; and that the court, after hearing all the evidence in the case, ordered the warrant to issue. That the said petition, and the oath to the same, was upon a blank form adopted and furnished by the said Court of Insolvency, and was in accordance with the practice of said court."

Hearing upon the bill and answer before *Field*, J., who ordered the bill to be dismissed; and the plaintiff appealed to the full court.

J. G. Abbott, for the plaintiff.

F. S. Hesseltine, for the defendant.

DEVENS, J. The case having been heard upon bill and answer, the allegations of the answer must be taken as true where they are in conflict with those of the bill. *Perkins* v. *Nichols*, 11 Allen, 542. From these it appears that Chipman, who had recovered a judgment against the petitioner, had assigned the same to one Bailey, with full authority to collect it in Chipman's name and as his attorney; that proceedings in insolvency against the plaintiff were instituted by Bailey, acting through his attorney, Francis S. Hesseltine, who was instructed to institute such proceedings; that the defendant, being advised that it was his duty so to do, read, signed, and made oath to the petition; and that the petition, which purported on its face to be for the use and benefit of Bailey, was not filed by the defendant, but by Bailey acting through his attorney. As to what took place at the hearing upon the petition in the Court of Insolvency the defendant avers that he knows nothing, but "is informed that Mr. Hesseltine, as attorney of Mr. Bailey, claimed in said court, and his claim was not called in question, that he was there proceeding in the name of George W. Chipman, judgment creditor, in behalf of said Bailey, and as his counsel, and that full and sufficient evidence was offered to support all the allegations in said petition." This certainly does not deny in clear terms the statement of the bill, that no evidence was offered at the hearing on the petition that Bailey had authorized or empowered Chipman to institute proceedings in insolvency against the plaintiff. It does not even

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aver the belief of the defendant of that of which he is informed. But if in fact the proceeding was instituted and conducted by Bailey through his attorney, Chipman acting only at his request as having the legal title to the judgment, and a warrant was issued on such a proceeding, whether proof of this was or was not made at the hearing, the warrant then issued should not be set aside, as it would be shown that the court actually had the jurisdiction which it exercised. That the proceeding was thus instituted and conducted appears clearly from the averments of the answer. Such a proceeding might be initiated by Bailey through Chipman. The legal title to the judgment debt was still in Chipman, and Bailey's interest was equitable only.

The general rule in Massachusetts is, that suits upon choses in action non-assignable in their character must be brought in the name of the assignor, but that the court will see that neither the rights of the assignee nor those of the defendant are prejudiced. *Clark* v. *Parker*, 4 Cush. 361. *Moore* v. *Coughlin*, 4 Allen, 335. *Goodrich* v. *Stevens*, 116 Mass. 170. *Moore* v. *Spiegel*, 143 Mass. 413. To this there are some statutory exceptions not necessary now to be noticed. Pub. Sts. c. 157, § 109. Whether Bailey might also have proceeded by a petition signed by himself, and setting forth the transfer to him of the judgment recovered by Chipman, it is not necessary now to decide.

The allegations of a petition, though on oath, are not evidence at the hearing. They form the ground for a notice to a debtor, and for a hearing of the case. While the statute requires that it shall be made by a creditor, it is settled that it may be made by his attorney. *O'Neil* v. *Glover*, 5 Gray, 144. On this principle, it certainly would seem that one having the legal title to a claim might properly bring such a petition at the request and for the benefit of his assignee; nor is the fact that Chipman has assigned his debt any reason why he may not make oath to its existence. The oath is to be construed in connection with the statement that the petition is for the benefit of Bailey, and alleges that it is made for the benefit of Bailey.

The plaintiff also urges that the original petition was not verified by oath, as required by law, the allegations therein being alleged to be true according to the petitioner's best knowledge and belief. This form of oath is obviously the only form that in

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many cases could be safely used, as the facts going to establish an act or acts of insolvency must often be numerous, complicated, and ascertained in various ways and from various sources. So far as we have been informed as to the practice in courts of insolvency, it has been in general use, and the forms provided by some at least of them contemplate that it will be adopted. The counsel attaches much importance to the words which declare that the petition shall contain a statement of the facts and the nature of the claim "verified by oath," and contends that these words can be satisfied only by a positive oath to the truth of the allegations, and that an oath "to the knowledge and belief" of an affiant in no way satisfies the requisitions of the statute. The St. of 1844, c. 178, § 9, providing for proceedings in involuntary insolvency, used the same phrase, and it was held in *O'Neil* v. *Glover*, *ubi supra*, after a full argument of the question, that an affidavit that the facts stated in a petition for a warrant in insolvency against a debtor are true, according to the best knowledge and belief of the party making it, was sufficient to justify the issuing of a warrant.

The cases in which it has been held that, where an affidavit must by statute have been made by some person described, who from the nature of his position had or should have had actual knowledge of the facts testified to, it was not sufficient that the verification should be according to the best knowledge and belief of the affiant, do not govern the case at bar. Thus, in *Taylor* v. *Wright*, 121 Ill. 455, cited by the plaintiff, it appears that by the statute of Illinois the purchaser of an estate sold for taxes, or his assignee, was required three months before the expiration of the two years limited for redemption to serve notice of his purchase upon the person in actual possession and occupancy of the land, if such person could be found in the county. If no such person could be found on diligent inquiry, publication of notice was to be made in some newspaper published in the county. It was then provided, "Every such purchaser or assignee, by himself or agent, shall, before he shall be entitled to a deed, make an affidavit of his having complied" with the previous provision, "stating particularly the facts," &c. It was held that such affidavit must state positively that it was made by the purchaser, his assignee, or his agent, and must also state as a

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fact that no one was in actual possession or occupancy of the land when the notice was served by publication, constructive possession or occupancy being contemplated by statute. It was further held, that, when the statement as to actual possession or occupancy was made upon belief only, the affidavit was not sufficient. It will be readily observed that in this case the affidavit was required to be made by a person who was not permitted to depend upon the information of others.

The plaintiff relies much, also, upon the recent decision in *Hadley* v. *Watson*, 143 Mass. 27, as supporting his contention. For similar reasons this case is quite distinguishable from that at bar. Where a party seeks to control the certificate of a judge rendered under the sanction of his official oath, and to prove exceptions to alleged rulings made by him, which he declines to allow as not being in conformity with the truth, a corresponding directness of assertion to the contrary by affidavit is to be expected before the matter is to be investigated. Especially is this so when the facts are not complicated nor derived from various sources, nor dependent upon the intelligence or good faith of others, but, if they exist at all, must exist to the personal knowledge of the plaintiff himself or his counsel at the trial, and generally of both. There is no hardship in such a case in requiring that the affidavit which is intended to sustain his petition should be in positive terms. While the words used in regard to a petition to prove exceptions are the same as those used in reference to petitions by a creditor in involuntary proceedings in insolvency, they are applied to quite a different subject, and the construction to be given to them in either case must be that which is demanded by the connection in which they stand.

Bill dismissed.

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MASSACHUSETTS CATHOLIC ORDER OF FORESTERS *vs.* CATHERINE CALLAHAN & another.

Suffolk. January 9, 1888. — March 6, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Beneficiary Association — Statute — Beneficiary.

After the St. of 1882, c. 195, § 2, took effect, which enlarged the Pub. Sts. c. 115, § 8, so as to permit beneficiary associations to assist widows, orphans, "or other relatives of deceased members," an application for membership, designating the applicant's mother as a beneficiary, was accepted by an association whose constitution stated "its object" to be to make "suitable provision for the widow and the orphan." The member subsequently married, and his wife survived him. *Held*, that the designation of the beneficiary was binding upon the association, and was not revoked by the marriage.

BILL OF INTERPLEADER against Catherine Callahan and Hannah Keefe, to determine to whom a sum due upon the death of a member of a beneficiary association should be paid. Hearing before *Devens*, J., who reported the case for the consideration of the full court. The facts appear in the opinion.

J. P. J. Ward, for Catherine Callahan.

P. O'Loughlin, for Hannah Keefe.

DEVENS, J. The Massachusetts Catholic Order of Foresters is a beneficiary association, originally formed on July 30, 1879, under the St. of 1874, c. 375, as amended by the St. of 1877, c. 204 (Pub. Sts. c. 115). The directing and governing body of the organization or order consisted of what was termed a high court, which was composed of representatives from the subordinate courts to which the members of the order individually belonged. It is through the high court acting by means of requisitions on the subordinate courts that the sums payable on the decease of the members, respectively known as death benefits or endowments, are collected and paid. The association which brings this bill of interpleader concedes its liability, and avers its readiness to pay the sum of $1,000, which became due on the decease of John J. Callahan, to the person legally entitled thereto. John J. Callahan became a member of the order on June 10,

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1883, and remained in good standing until the day of his death, on February 24, 1886, having paid all assessments made upon him. In his application for membership, which was according to the form prepared by the association, he designated his mother, Catherine Callahan, as the person to whom the sum due as endowment should be paid in the event of his decease. John J. Callahan was not then married; he did not then or afterwards live with his mother, nor was she then or afterwards dependent upon or supported by him. He subsequently married Mary J. Callahan, who survived him, but who is now deceased. Hannah Keefe, who was the mother of Mary J. Callahan, has been appointed the administratrix of her estate. Mrs. Keefe is also the next of kin and sole heir of her daughter. The sum due from the association is claimed by Catherine Callahan under the designation made to her in the application for membership, which was never changed. It is also claimed by Hannah Keefe, (either as administratrix or next of kin, as the court shall deem most correct,) upon the ground that the designation of his mother as the beneficiary of the fund due on his decease could not legally have been made by John J. Callahan; and that under section 5, article 16, of the constitution of the subordinate courts, by which it is provided that "in case no direction has been made by a brother, either by will or entry in his application for membership, as to the disposal of his endowment, the trustees of the court of which he was a member may cause the same to be paid to the person or persons whom they may find entitled thereto," it should be held that Mary J. Callahan was the person entitled thereto.

Under the statutes of Massachusetts as they existed in 1879, when the corporation was originally formed, the only right which the association had to provide for or to accumulate a fund for the purpose of paying a sum upon the decease of its member was "for the purpose of assisting the widows, orphans, or other persons dependent upon deceased members." Pub. Sts. c. 115, § 8. This section was amended by the St. of 1882, c. 195, § 2, which provided that the fund thus authorized should be "for the purpose of assisting the widows, orphans or other relatives of deceased members, or any persons dependent upon deceased members." The association republished its constitution and

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by-laws in 1882, subsequent to the passage of the statute of 1882, with certain alterations made subsequent thereto, although the existence of that statute is not alluded to or noted. These changes had no reference to, nor were they occasioned by reason of, the larger powers with which the corporation was invested. They related to matters of detail only. It was under this constitution of 1882 that the association was conducting its business when John J. Callahan became a member, in 1883.

It is the contention of Mrs. Keefe, that although Catherine Callahan, as the relative of her son, might have been designated under the statute of 1882 as a beneficiary, yet this statute had never been adopted by the association. The statute required no formal adoption. It enlarged the powers of this and other similar beneficiary associations. When, after the passage of the statute of 1882, the association accepted the application of John J. Callahan and the designation which he might then lawfully make, it could not be said by it, or by any claimant, that it was exercising, and was only authorized to exercise, the more limited powers which it had under the earlier statute.

It is also contended, that by its constitution the association had so limited itself that it could not accept a designation of the mother. We have no occasion to consider whether a beneficiary association might not by its constitution so limit itself in its operations that its endowments should be only for the benefit of one or more classes of those whom it might lawfully entitle thereto, as for the widows only or orphans only of deceased members. We find no such intention manifested by this association. The argument on behalf of Mrs. Keefe is, that the constitution of 1882, under the title "Object," has the effect to limit the benefits of the association to two classes of persons only, widows and orphans. The "name and object" of the association are stated in a preamble to the constitution. It is declared that the object of the organization is to promote friendship, unity, and true Christian charity. It defines each, unity being defined as "unity in uniting together for mutual support, and in making suitable provision for the widow and the orphan." It would be a very forced construction to infer from this generality, that the association had thus excluded itself from making provision for those who were dependent on the deceased which

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it legally might make when the constitution was originally formed, or for his relatives which it might lawfully make when Callahan became a member. The constitution of 1879, which was the one originally made, and that of 1884, which was in force when Callahan died, are each prefaced by the same recital of "name and object," yet each constitution declares, in defining the duties and powers of the subordinate court, that the principal object of the association is to secure "to the dependents of its members" the sum of $1,000, payable on the death of such member. It is thus manifest, that under these two constitutions it could not have been intended to limit the benefits of this association to the widow and orphan, merely because they alone are mentioned in the declaration of its "name and object." In the constitution of 1882, in defining the powers of the subordinate courts, the phrase above quoted as to securing "to the dependents of its members" $1,000, is not used. Under that constitution, to hold that, because it had adopted as its preface a statement that among its purposes was a suitable provision for the widow and orphan, it could not provide for others, as "relatives" or "dependents," for whom the statute permits such association to provide, would not be a reasonable construction.

The deceased member had a right to designate as the beneficiary of the fund any person coming within the statutory provisions which enumerate those who may be thus designated. The law which permitted a relative merely, not being necessarily a dependent, to be designated, was in force when he made his designation. The designation of his mother by the deceased was therefore one to which the association had a right to assent, as it did assent, by accepting the order of the deceased. *Briggs* v. *Earl*, 139 Mass. 473. *American Legion of Honor* v. *Perry*, 140 Mass. 580. *Elsey* v. *Odd Fellows' Relief Association*, 142 Mass. 224. This was not revoked by the subsequent marriage of John J. Callahan, and his mother, Catherine Callahan, is now entitled to receive the fund of $1,000.

Decree accordingly.

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JOSHUA M. SEARS *vs.* CHARLES F. CHOATE & others.

Suffolk. January 9, 1888. — March 9, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Trust — Termination — Alienation — Equitable Attachment.

A testator, by his will, after giving the residue of his estate to trustees, in trust to hold, invest, and manage the same, and a sum of money to his only son and heir to be paid him at the age of twenty-one years, provided that "all such parts of the income of my estate, which may be necessary for the support and education of my son, I order to be used for that purpose, and when he shall be twenty-one years old I direct that $4,000 shall be paid to him annually, when he shall be twenty-six years old $5,000 a year, and $10,000 per year when he shall be thirty years old." *Held*, on a bill in equity brought by the son after reaching the age of thirty years, that the trustees held so much of the residue of the estate as was needed to produce the net income of $10,000 upon a simple trust to pay the son the annuity; that he was the absolute equitable owner of the trust fund and the income, both of which he might alienate and his creditors might reach; and that he was entitled to have the trust terminated.

BILL IN EQUITY, filed September 19, 1887, against the trustees under the will of Joshua Sears, to terminate a trust created for the benefit of the plaintiff in the residue of his estate. The bill alleged the following facts.

Joshua Sears died on February 7, 1857, leaving the plaintiff his only child and sole heir, then a minor, and a will, which named Alpheus Hardy, Horatio Harris, and Hugh Montgomery as executors and trustees, and contained the following clauses:

"All the rest, residue and remainder of my estate I give to said Alpheus Hardy, Horatio Harris, and Hugh Montgomery their heirs and assigns as joint tenants in trust to hold, invest, manage and take care of the same according to their best knowledge and discretion; and I wish them to invest one half part of my estate in favorable purchases of real productive estate, stores to be preferred, looking well to the value and titles thereof. And I wish them to invest one half part of said estate in bottom mortgages on estates which shall be considered of twice the value of the money loaned thereon, the titles of such estates to be well examined.

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"I give to my son Joshua M. Sears the sum of thirty thousand dollars to be paid to him at the age of twenty-one years. All such parts of the income of my estate which may be necessary for the support and education of my son, I order to be used for that purpose, and when he shall be twenty-one years old I direct that four thousand dollars be paid to him annually; when he shall be twenty-five years old six thousand dollars per year, and ten thousand dollars per year when he shall be thirty years old."

The will was duly admitted to probate, and the trustees named therein were duly appointed and qualified as such trustees. Upon the plaintiff's reaching the age of twenty-one years, on December 25, 1875, all the property then in the hands of the trustees, and constituting the residuary trust fund created by the will and not required to pay to the plaintiff the annuity bequeathed to him by the will, was adjudged by this court (120 Mass. 524) to be held upon a resulting trust in favor of the plaintiff, and thereupon was ordered to be paid, and was paid, to him as his own absolute property. Hardy, Harris, and Montgomery, the original trustees named in the will, have since deceased, and the defendants have been duly appointed and qualified as trustees in their stead, and are now acting as such.

Under the provisions and operation of the will, the plaintiff has the entire beneficial interest both in the income of the property held by the trustees for his benefit and in the property itself. The interest of the plaintiff in both the income and the principal of the trust fund is alienable at his pleasure, and is subject to the claims of his creditors. No reasons exist for the perpetuation of the trust, while the further continuance of the same causes the plaintiff unnecessary inconvenience and expense.

The prayer of the bill was, that it might be adjudged that the trust be terminated, and that the trustees might be directed to convey to him, for his own absolute use and benefit, all the trust property now held by them for his benefit.

The answer admitted the allegations of the bill except as to the construction of the will, as to which it also admitted that, "under the provisions and operation of said will of Joshua Sears, the plaintiff has the entire and beneficial interest in the income of the property held by them as such trustees, and also in the

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property itself; but whether or not the interest of the plaintiff in both the income and principal of said trust fund is alienable at the pleasure of the plaintiff and subject to the claims of his creditors, these defendants can neither admit nor deny, and most respectfully submit that the same are questions of law to be considered and determined by this court, as also the further question whether or not any reason exists for the perpetuation of the trust."

Hearing upon the bill and answer before *C. Allen*, J., who reserved the case for the consideration of the full court.

R. Olney, for the plaintiff.

J. F. Colby, for the defendants.

MORTON, C. J. In *Sears* v. *Hardy*, 120 Mass. 524, two cases were considered together. One was a bill in equity by the only child and heir of Joshua Sears, the prayer being that the trustees be ordered to convey to the plaintiff so much of the estate in their hands, and the surplus income thereof, as was not required for the payment of the annuities provided for by the will. The other was a bill by the trustees asking for instructions as to their duties under the will. The fourth prayer was broad enough to include the question raised in the case at bar, but the question was not in fact raised, both parties conceding that the trustees were to retain in their hands enough to support the annuities, and the only question discussed being whether the surplus of the estate should be paid over to the heir at law discharged of the trust. The question now presented was not raised or decided in those cases.

Under the decrees in those cases the trustees retained in their hands sufficient of the property to produce a net income of ten thousand dollars, being the amount of the annuity now payable to the heir at law.

The present bill alleges that the plaintiff has the entire beneficial interest both in the income of the property held by the trustees for his benefit and in the property itself, and prays that this trust may be terminated and the property conveyed to him.

The trustees now hold the trust estate upon the simple trust, as defined in the will, to pay the plaintiff ten thousand dollars per year. There is in the will no limitation over of the estate in any contingency to any other person; there is no discretion

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given to the trustees, and there is no provision that the income or the estate shall not be alienable by the plaintiff or attachable by his creditors. It cannot be doubted that under this will the plaintiff took an equitable estate which he might alienate, and which equity would apply to the payment of his debts. *Sparhawk* v. *Cloon*, 125 Mass. 263.

It is said in the opinion in the former case, that "it is conceded by all parties that, in order to carry out the plain intention of the testator to secure to his son an honorable support, during his life, not exposed to the risks of his improvidence or misfortunes, the trustees should retain in their hands enough of the estate to produce beyond question the annuity provided for in the will." It is quite probable that the testator had this idea or intention in his mind; but if he had, he failed to frame his will in such a way as to carry out his intention. This court has held that the founder of a trust may give an equitable life tenant a qualified estate in income which he cannot alienate and which his creditors cannot reach. *Broadway National Bank* v. *Adams*, 133 Mass. 170. But in order to give such a qualified estate, instead of an absolute one, the language of the founder must be clear and unequivocal to that effect. Taking this will as it is, we should not be justified in holding that the plaintiff took anything less than an absolute equitable estate both in the income and in the corpus of the trust.

There is no doubt of the power and duty of the court to decree the termination of a trust, where all its objects and purposes have been accomplished, where the interests under it have all vested, and where all parties beneficially interested desire its termination. Where property is given to certain persons for their benefit, and in such a manner that no other person has or can have any interest in it, they are in effect the absolute owners of it, and it is reasonable and just that they should have the control and disposal of it unless some good cause appears to the contrary. *Smith* v. *Harrington*, 4 Allen, 566. *Bowditch* v. *Andrew*, 8 Allen, 339. *Inches* v. *Hill*, 106 Mass. 575. *Stone, petitioner*, 138 Mass. 476. *Underwood* v. *Boston Five Cents Savings Bank*, 141 Mass. 305.

In the case before us the trustees hold the fund in question upon a simple trust; the plaintiff is the absolute equitable owner

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of the fund and the income; he may alienate them and they can be reached by his creditors. If the testator had the intention of guarding against his possible improvidence or misfortune, he failed to carry his intention into effect, and thus the reason for the existence of a trust fails.

We are of opinion that the plaintiff is entitled to a decree terminating the trust, according to the prayer of his bill.

Decree for the plaintiff.

CATHERINE O. MACTIER *vs.* HANNAH OSBORN.

Suffolk. January 11, 1888. — March 6, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Lease — Covenant to Insure — Forfeiture — Equitable Relief.

Equity will relieve against a forfeiture incurred by the breach of a covenant to insure in a lease of real estate, caused by accident or mistake, if no actual damage has been sustained by the lessor.

A lease of real estate contained a covenant that the lessee should keep the buildings "properly and fully insured, at all times during said term, in safe offices to be approved" by the lessor, to whom the insurance money was to be payable, and also contained the usual condition for re-entry on breach of any of the covenants without notice or demand. The lessee, a woman, at the expiration of policies which were satisfactory to the lessor, intending in good faith to have them renewed in the same amounts and form, took out through an insurance broker new policies, which, without her knowledge, were made payable to a mortgagee. The lessor, who had sustained no actual damage, without any demand upon the lessee, or any notice that the insurance was unsatisfactory, made an entry for an alleged breach of covenant, and thereafter refused to consult with the lessee as to changing the form of the policies. *Held*, that equity would relieve against such a breach of the covenant as was made by the lessee.

MORTON, C. J. This is a writ of entry to recover an undivided third part of a parcel of real estate in Boston.

On November 7, 1873, Edward J. Holmes and William E. Perkins, trustees, being the owners of the land, executed a lease thereof to Levi B. Gay for the term of twenty years from the first day of January, 1874. The estate subject to the lease is now held by conveyances from said trustees and others, one third by the demandant, one third by the tenant, and one sixth

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each by Julia M. Dehon and Sarah A. Treilhard. The tenant is now the lessee, holding the title of Gay by deed from him and by mesne conveyances. The lease contains the covenant that the lessee "will keep all buildings upon said premises during said term properly and fully insured, at all times during said term, in safe offices to be approved by said parties of the first part, and in such manner that the insurance money shall be payable to said parties of the first part, who shall deposit the same with the New England Trust Company or some safe bank; and such money shall be used in paying the expenses, as far as may be, of repairing or rebuilding said building or buildings by the party of the second part, and shall be drawn from the said company or bank at times and in amounts as needed for said purpose; and after said building or buildings shall have been so repaired or built, the remainder of such money, if any, shall be paid to said party of the second part. In case of failure by said party of the second part to repair or rebuild as aforesaid, said money, or so much thereof as may remain, shall belong or remain to the use of said parties of the first part." The lease contained the usual condition for re-entry on breach of any of the covenants, without notice or demand.

At the time the lease was assigned to the tenant there was insurance upon the building by several policies to the amount of thirty thousand dollars, payable in case of loss to the lessors, which was satisfactory to them. These policies were assigned to the tenant. At their expiration in March, 1886, one Osborn, acting for the tenant, took out, through a firm of insurance brokers, policies to the same amount, but they were made payable in case of loss to the Suffolk Savings Bank for Seamen and Others, to which bank the tenant was indebted to the amount of twenty thousand dollars for money borrowed to purchase the lease. In September, 1886, the demandant, having ascertained the form in which those policies were taken out, entered on the premises for an alleged breach of the covenant to insure, and on October 12, 1886, brought this suit to enforce the alleged forfeiture.

It appeared at the trial that neither the tenant nor the said Osborn had any knowledge until after the said entry by the demandant as to the form in which said policies were written, and

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both meant in good faith that the covenants in the lease relating to insurance should be observed to the same extent that they were observed in the first policies. It also appeared that the demandant prior to the entry made no demand upon the tenant, and gave her no notice that the insurance was not satisfactory, and after the entry refused to consult with the tenant as to changing the form of the policies.

The case comes before us on a report, which provides that, if there has been no breach of the covenant in the lease as to insurance, or if there has been a breach but it is one which equity will relieve against, then judgment may be entered for the tenant.

The statement of the case shows that the claim of the demandant is *strictissimi juris*. She seeks to enforce a forfeiture for an alleged breach of covenant, which has arisen from an accident or mistake such as is likely to occur innocently, particularly in the case of a woman not accustomed to business affairs, and which did not arise from any wilful default or culpable negligence on the part of the tenant.

The covenant in question is a peculiar one. It does not create a clear and exactly defined duty on the part of the lessee, as would be the case if it had been a covenant to keep the building insured in an amount and office named, by policies payable to the lessors. The amount, the office, and the form of the policy are not fixed, and the covenant clearly contemplates that these are to be arranged by a conference between the parties. Under such a covenant, it may fairly be argued that, if a lessee in good faith procures insurance intending to observe the requirements of the covenant, but fails to do so, the lessor could not, without notice, enforce a forfeiture. But however this may be, and assuming that the lessee must at his own risk see to it that he observes the covenant, and therefore that there has been a breach of covenant and a forfeiture at law in this case, we are of opinion that it is a case in which equity ought to furnish relief.

The demandant cites many cases, mostly English, to the point that courts of equity will not grant relief from a forfeiture for breach of a condition to insure. This may be so where there is a wilful and intentional neglect to insure according to the covenant. But where the failure to insure is the result of accident

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or mistake, each case must be determined by the circumstances of the particular case.

Judge Story states the rule in England to be, that "in all cases of forfeiture for the breach of any covenant, other than a covenant to pay rent, no relief ought to be granted in equity, unless upon the ground of accident, mistake, fraud, or surprise." Story Eq. Jur. § 1323.

It has been held in this court that equity will grant relief from a forfeiture for the non-payment of rent on the day it was due. *Atkins* v. *Chilson*, 11 Met. 112. And the same principle was applied where there had been a forfeiture for breach of a condition to indemnify a grantor in a deed against an outstanding mortgage and interest on it. *Sanborn* v. *Woodman*, 5 Cush. 36. In *Hancock* v. *Carlton*, 6 Gray, 39, there had been a forfeiture for breach of a condition to indemnify against a mortgage. The court refused equitable relief, but it was upon the ground that the forfeiture was caused by the laches of the party seeking relief; and the intimation of the opinions is clear that relief would be granted upon the ground of accident or mistake if proved. We see no reason why the same principle should not apply to a breach of a covenant to insure, caused by accident or mistake, where no actual damage has been sustained by the lessor.

The result of the authorities, supported by sound principle, is, that where there has been a breach of a covenant to pay rent equity will relieve against a forfeiture although the breach is wilful on the part of the lessee; and where there has been a breach of a covenant to perform some collateral duty, such as to repair or insure, which has been caused by accident or mistake, equity will relieve if the lessor can by compensation or otherwise be placed in the same condition as if the breach had not occurred. *Sanders* v. *Pope*, 12 Ves. 282, and note. *Livingston* v. *Tompkins*, 4 John. Ch. 415, 431. *Henry* v. *Tupper*, 29 Vt. 358.

In the case at bar, where the former policies, which were satisfactory to the lessors, expired, the lessee in good faith intended to have them renewed in the same amounts and form. By accident, or by a mistake of the insurance brokers, they were renewed in a form which does not fairly meet the requirements of the

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covenant. This was not wilful or voluntary on her part. It was not an accidental forgetfulness to renew the policies. The property has been all the time fully insured. It was an occurrence not anticipated by her, and not known to her until after the demandant entered to enforce a forfeiture. No misconduct or culpable fault can be attributed to her. The lessors have not in fact been injured by the accident, and can now be put *in statu quo*. It is against equity and good conscience that the demandant should insist upon a forfeiture of a valuable leasehold estate.

We do not think that the tenant's acts in making a change in the policies after the demandant's entry have any important bearing upon the case. She applied to the demandant for a conference as to the form of the policies, but the demandant refused to treat with her. The tenant is willing to make insurance in a form which will comply with the covenant.

Under all the circumstances of this case we are of opinion that equity should relieve the tenant from the forfeiture, and that, according to the terms of the report, there should be

Judgment for the tenant.

J. C. Gray & A. P. Loring, for the demandant.

R. M. Morse, Jr., (*W. P. Blake* with him,) for the tenant.

CITY OF LOWELL *vs.* COUNTY COMMISSIONERS OF MIDDLESEX.

Middlesex. January 17, 1888. — March 6, 1888.

Present: MORTON, C. J., DEVENS, HOLMES, & KNOWLTON, JJ.

Tax — Appeal — County Commissioners — Abatement — Notice — Month — Complaint — Amendment — Evidence — Expert — Certiorari — Proceedings and Practice.

An appeal lies to the county commissioners, under the Pub. Sts. c. 13, § 41, upon the refusal of assessors to abate the tax of a corporation after the tax commissioner has fixed a less value upon its real estate and machinery, although the corporation without excuse has omitted seasonably to file a sworn list of its estate with the assessors, as provided by c. 11, § 72.

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Notice should be given by assessors refusing to abate a tax to the corporation, and the month within which, under the Pub. Sts. c. 11, § 71, complaint must be made to the county commissioners for an abatement, will begin to run from the date of such notice.

County commissioners may allow an amendment to such a complaint made by a corporation, the effect of which is to limit it to certain parcels of its property.

On such a complaint, or on an amendment thereto, it cannot be shown that any of the property of the corporation has been undervalued by the assessors.

At the hearing on such a complaint made by a manufacturing corporation, evidence of the value of its land for manufacturing purposes, and of the value of water power in another place, the conditions in the two places not appearing to be unlike, is admissible.

Whether a witness is qualified to testify as an expert at such a hearing is largely within the commissioners' discretion, which will not be revised on certiorari if it does not appear to have been wrongfully exercised.

Evidence was admitted at such a hearing as to the market value of the shares of the corporation. *Held*, that a writ of certiorari, it not appearing that the petitioner was prejudiced, would not issue therefor.

County commissioners, in reply to a petition for a writ of certiorari, instead of filing an answer, should make a return stating their rulings and proceedings.

THREE PETITIONS for writs of certiorari to quash the proceedings of the county commissioners of Middlesex in abating taxes assessed upon certain corporations by the city of Lowell.

IN THE FIRST CASE the petition alleged in substance that the assessors of the city of Lowell, on May 1, 1886, duly assessed a tax upon the Merrimack Manufacturing Company, a corporation having its usual place of business in that city; that the corporation did not file with the assessors a list of its estate liable to taxation in the city for that year, duly subscribed and sworn to by it, within the time specified by the assessors for bringing in such lists; that the tax commissioner of the Commonwealth determined the value of the real estate and machinery of the corporation taxable in the city for the year 1886 at a less value than that determined by the assessors, and gave it notice thereof on September 27, 1886; that the corporation applied in writing, in pursuance of the notice from the tax commissioner, on October 19, 1886, to the assessors for an abatement of its tax; that on October 28, 1886, the corporation filed with the assessors a list of all its real estate and machinery liable to taxation in the city for that year, and made oath thereto, and at the same time a hearing was had before the assessors upon its application; that the assessors on November 16, 1886, refused to abate the tax, of

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which they gave notice to the corporation on December 8, 1886; that the corporation made a complaint to the county commissioners of Middlesex for a reduction of the valuation by the assessors of all its real estate and machinery, and for an abatement of the tax, and filed the same with the clerk of the commissioners on December 17, 1886; that notice of the complaint was duly given, and the petitioner appeared before the commissioners at the hearing thereon; that the commissioners found that the corporation did not file with the assessors a list of its estate liable to taxation in the city for the year 1886, subscribed and sworn to, within the time specified by the assessors in their notice for bringing in such lists; that the commissioners also found that there was no good cause why such list was not seasonably brought in or filed by the corporation; and that thereupon the petitioner moved that the complaint be dismissed, on the ground that no such list had been brought in or filed by the corporation with the assessors within the time specified by them, and no good cause had been shown why such list had not been seasonably brought in or filed; but the commissioners overruled the motion, and ruled that they had jurisdiction in the premises, and legal right and authority to hear and determine the matter of the complaint, upon the ground that the tax commissioner had placed a lower value than the assessors upon the property of the corporation, and so notified the corporation, and ordered the hearing to proceed.

The petition also alleged that the assessors valued all the machinery and real estate of the corporation in various lots; that at the hearing before the commissioners, and before any evidence was offered, the corporation filed an amendment to its complaint, which set forth that four lots only, covering its cotton and print yards, so called, were overrated, and that "your petitioner will not contend at this hearing as to the assessment of its other property by said assessors"; and that the amendment was allowed by the commissioners, against the objection of the petitioner that they had no right or authority to allow the same, and that it was too late so to do.

The petition further alleged, that the corporation, at the hearing before the commissioners, called as a witness Charles H. Dalton, who then was and had been the treasurer of the corporation

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since October, 1877, and previously thereto for more than twenty years had been treasurer and manager of similar corporations, but had not bought or sold any land for manufacturing purposes in Lowell; and that he was permitted to testify, against the objection of the petitioner on the ground that it was incompetent and irrelevant, as to the number of shares of stock in the corporation held by trustees, guardians, charitable institutions, corporations, and individuals, as to what was the market value of the stock on or just before May 1, 1886, and as to what the corporation's land in its cotton and print yards was worth for manufacturing purposes.

The petition further alleged, that the petitioner offered to show by competent evidence the fair cash value of all the real estate and machinery of the corporation on May 1, 1886, but the evidence, against the objection of the petitioner, was excluded by the commissioners; that the commissioners ruled that, under the amendment to the complaint, they were limited in their inquiry and determination to the fair cash value of the property specified in the amendment, but that they would hear the evidence as bearing upon the value of the property in the cotton and print yards; that the commissioners also ruled that, as matter of law, they could not determine the true value of all the real estate and machinery on that day; that the commissioners further ruled that the inquiry before them was not to determine the true value of all the real estate and machinery, or to determine between the valuations thereof made by the tax commissioner and the assessors, but only the value of the items of property of the valuation of which the petitioner complained; that the commissioners further ruled that the petitioner was bound by the valuation by the assessors of all property not included in the amendment to the complaint; and that the commissioners, upon evidence of the fair cash value of the real estate and machinery specified in the amendment to the complaint, abated a certain portion of the tax.

The petition averred that the commissioners erred in making the abatement, for the following reasons: "1. In that they overruled the motion of said petitioner to dismiss said petition. 2. In that they ruled that, notwithstanding no list had been brought in as aforesaid, and no good cause had been shown

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why the same had not been seasonably brought in or filed, they had jurisdiction in the premises, and legal right and authority to hear and determine the matter of said petition. 3. In that they allowed said amendment to said complaint. 4. In that they admitted the evidence aforesaid of Charles H. Dalton. 5. In that they excluded the evidence of said city to show the fair cash value of all said real estate and machinery on May 1, 1886, except for the purposes aforesaid. 6. In that they ruled, as matter of law, that they could not hear evidence or determine the true value of all said real estate and machinery on May 1, 1886. 7. In that they ruled that the inquiry before them was not to determine the true value of all said real estate and machinery on May 1, 1886, or to determine between the valuation made by said tax commissioner of all said real estate and machinery, and the valuation of the same made by said assessors. 8. In that they did not find and determine the value of all said real estate and machinery. 9. In that they, without hearing evidence as to the true value of all said real estate and machinery, undertook to find its true value. 10. In that they entertained jurisdiction of said company's petition filed as aforesaid. 11. In that they abated a portion of the tax on said machinery. 12. In that they abated any portion of the tax."

IN THE SECOND CASE, the petition was substantially like that in the first case, except that it alleged that the Boott Cotton Mills, which was the corporation assessed, brought in to the assessors a list of all its estate liable to taxation in 1886 within the time specified by the assessors; and that, at the hearing before the commissioners on its complaint for an abatement of the tax and an amendment thereto, the corporation called as a witness Charles J. Goodwin, agent of the Indian Orchard Cotton Mills, who, after testifying that he had been agent of these mills since 1868, and had been engaged in cotton manufacturing in New Hampshire for thirty years prior thereto, and had not examined the land of the corporation, was permitted to testify, against the objection of the petitioner that the same was incompetent, that he thought that twenty cents a foot would be the outside price of land in Massachusetts for manufacturing purposes.

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IN THE THIRD CASE, the petition was substantially like that in the first case, except that the Tremont and Suffolk Mills, which was the corporation assessed, at the hearing before the commissioners on its complaint for an abatement of the tax and an amendment thereto, called as a witness Henry F. Coe, formerly agent of the Washington Mills of Lawrence, who, after testifying that he had had to do with the purchase of mills with water power in Lawrence and in Vermont, was permitted to testify, against the objection of the petitioner that it was incompetent, what mill water power was worth in Lawrence.

An answer filed to the petition in each case by the commissioners alleged "that the facts and rulings therein set forth are correctly stated, and that the copies thereto annexed are true copies of the originals, and that no error appears upon their record, and that said petition does not set forth any legal cause for granting the prayer thereof." Hearing upon the petitions and answers before *Devens*, J., who reserved the cases for the consideration of the full court.

J. N. Marshall, (*W. F. Courtney* with him,) for the petitioner.

T. L. Livermore, for the corporations.

H. C. Bliss, Assistant Attorney General, for the Commonwealth.

MORTON, C. J. The object of the thirteenth chapter of the Public Statutes is to provide for an excise or duty upon the franchises of corporations payable to the Commonwealth. *Commonwealth* v. *Hamilton Manufacturing Co.* 12 Allen, 298. The provisions which affect this case are contained in §§ 38 to 41. The general scheme of the statute is that the tax commissioner shall determine in the first instance the taxable value of the franchise. To do this he is to ascertain the fair market value of all the shares of the capital stock of the corporation, and deduct therefrom an amount equal to the value, as determined by him, of its real estate and machinery subject to local taxation. For this purpose he may take the amount at which such real estate and machinery are assessed at the place where they are located, but such local assessment is not conclusive upon him.

It is clear that, under the provisions thus far referred to, if the valuation of the tax commissioner of the real estate and machinery is less than the valuation by the local assessors, the corporation

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would be subjected to double taxation on a part of its property. To prevent this injustice the statute provides that in such case the tax commissioner shall notify the corporation, which may within one month after the date of such notice apply to the local assessors for an abatement of the local tax, and, if they refuse to grant an abatement, may forthwith appeal to the county commissioners, whose decision is final, and conclusive upon all parties. When the case gets before the county commissioners, the corporation may have no interest in the question, and can have but a slight interest. The tax commissioner on behalf of the Commonwealth, and the town or city in which the real estate and machinery are located, become the actors and parties interested, the main object of the hearing being to determine what valuation shall be binding upon each of them, thus affecting the amount of the excise or tax which each is entitled to assess and collect. Such being the purposes and character of the statute, we do not think that it was the intention of the Legislature that the appeal should be defeated by the previous failure of the corporation to file a sworn list of its property under § 72 of c. 11 of the Public Statutes.

The statute we are considering provides that the tax commissioner shall notify the corporation of his determination, "and if it does not, within one month from the date of such notice, make application to said assessors for an abatement, and does not, in case of the refusal of said assessors to grant an abatement, forthwith prosecute an appeal in accordance with the provisions of section seventy-one of chapter eleven, and give notice thereof to the tax commissioner, such determination shall be conclusive upon said corporation." Pub. Sts. c. 13, § 41. Section 71 of the Pub. Sts. c. 11, provides that, "if the assessors refuse to make an abatement to a person, he may, within one month thereafter, make complaint thereof to the county commissioners by filing the same with their clerk, and if upon a hearing it appears that the complainant is overrated, the commissioners shall make such an abatement as they deem reasonable." This, standing alone, gives the unlimited right to apply to the county commissioners for an abatement of the valuation of the assessors, and points out the way in which this may be done. Section 72 of the Pub. Sts. c. 11, provides that no abatement shall be had unless the person

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has filed a sworn list with the assessors. Section 41 of the Pub. Sts. c. 13, refers only to the Pub. Sts. c. 11, § 71, and adopts the mode therein established for the revision of the valuation of the assessors. It does not directly refer to § 72, or provide that the failure to file a sworn list shall defeat the right to an abatement.

The two chapters have different purposes in view; and we do not think we can read in the thirteenth chapter by construction such a provision, thus subjecting the corporation to double taxation. Such a construction would defeat the main purpose of the Legislature, which is to adjust as between the Commonwealth and the town or city the proportions of the whole tax or excise to be paid by the corporation, and not to expose it to double or excessive taxation. We are therefore of opinion that the county commissioners correctly ruled that their jurisdiction was not defeated by the fact that the corporation had without excuse failed seasonably to file with the assessors a sworn list of its property.

The petitioner also contends that the county commissioners had no jurisdiction, because the corporation did not seasonably file its complaint with the clerk. The statute provides that, "if the assessors refuse to make an abatement to a person, he may, within one month thereafter," file his complaint. The facts as stated in the petition are, that the corporation applied to the assessors for an abatement on October 19, 1886; that a hearing was had on October 28, 1886; and that the "assessors on November 16, 1886, refused to grant said abatement, of which they gave notice to said company, December 8, 1886." The complaint was filed on December 17, 1886, which we think was seasonable. The assessors do not keep records of such transactions, which, like those of a court of justice, are notice to the world. It would be a hardship upon applicants to make their rights depend upon the secret action of the assessors without any notice to them, and the assessors can easily give them notice of the refusal. The assessors of Lowell understood this to be their duty, and we think that their notice on December 8 was the completion of their act of refusal, and that the corporation was entitled to file its complaint within one month from that date.

The assessors of Lowell, in assessing the property of the corporation, made separate valuations of different lots or parcels

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of the property. After filing its complaint to the county commissioners, the corporation filed an amendment, by which it limited its complaint to four specified parcels of property, which it alleged was assessed above its fair value, and alleged that it would not contend as to the assessment of its other property by the assessors. The amendment is in effect nothing but a waiver of its objections to the assessment of all its property not specified therein. It was properly allowed, and the petitioner has no ground of complaint. It might restrict the corporation in its proofs to the parcels named in it, but it could not affect the rights of the petitioner either as to these or as to the parcels not named in it.

The ground of the objection to it is, that under the original complaint the county commissioners were required to reassess the value of all the parcels, and that the petitioner had the right to show that some of them were undervalued by the assessors, and should be valued and assessed at a larger sum. But this ground cannot be maintained. The statute provides for an application to the assessors "for an abatement," and, if this is refused, for a complaint in the nature of an appeal to the county commissioners. The word "abatement" is used in the same sense in which it is used in the other parts of the tax statutes. Authority is not given to the assessors nor to the county commissioners to make a revaluation of the whole property, but only to make an abatement in the same manner in which they may abate under the Pub. Sts. c. 11.

It was held in *Lowell* v. *County Commissioners*, 3 Allen, 546, that, where a tax is assessed upon an individual or a corporation by a valuation of the separate parcels of real estate belonging to them, and the complainant proves that any one or more is overvalued, he is entitled to an abatement, and that the inquiry whether other lots have been valued at too low a rate is not open to the town or city. It cannot ask that the valuation on other property of the complainant shall be raised in order to make a set-off against that part of the assessment which is shown to be excessive. Neither the assessors nor the county commissioners have any jurisdiction or authority to increase the valuation or assessment made by the assessors on any parcel of property. The decision and reasoning of the court in that case

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are applicable to and decisive of the case at bar on this point. Neither under the original complaint nor under the amendment could the city show that its assessors had valued and assessed some of the parcels at too small an amount. The rulings of the county commissioners upon this point were therefore correct.

The petitioner before the county commissioners objected to certain testimony of Charles H. Dalton. It appears by the record that the commissioners adopted the proper test, that is, the fair cash value of the property on the 1st of May. They had the right to consider its value for manufacturing, as well as for other purposes. The question whether the witness had sufficient knowledge of the value of property to enable him to give his judgment upon the matter in question, was largely for their determination, and within their discretion, and we cannot see that this discretion was wrongfully exercised. *Swan* v. *Middlesex*, 101 Mass. 173. It is difficult to see how the testimony of the witness as to the market value of the shares of the corporation was admissible upon the issue pending before the commissioners; but it is equally difficult to see, from anything disclosed in the record before us, that its admission was prejudicial to the petitioner. It was not used as a test of the value of the property of the corporation, as in *Chicopee* v. *County Commissioners*, 16 Gray, 38. There was much other evidence as to the value.

A petition for a writ of certiorari is addressed to the discretion of the court; and it has always been the practice, when unimportant evidence has been erroneously admitted, to refuse the writ of certiorari, unless it appears that the petitioner has been prejudiced by its admission, or if it appears that the findings are justified by the other evidence. *Cobb* v. *Lucas*, 15 Pick. 1. *Gleason* v. *Sloper*, 24 Pick. 181. *Farmington River Water Power Co.* v. *County Commissioners*, 112 Mass. 206.

Upon the whole case, we are of the opinion that substantial justice does not require that the writ should issue. To prevent this case from being used as a precedent as to the proper mode of proceeding, we refer to the fact that the case is not brought before us in proper form. Instead of answering, the county commissioners should make a return stating their rulings and proceedings. *Tewksbury* v. *County Commissioners*, 117

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Mass. 563. But as all parties are desirous of an early decision of the merits, we overlook the error in form.

In the first case, and in the second case, which is governed by the first, the entry must be *Petitions dismissed.*

All the questions raised in the third case, except that as to the admissibility of the testimony of Henry F. Coe, are considered, and decided in the first case. He was permitted to testify "what mill water power was worth in Lawrence." If the conditions which affect the value of water power are substantially the same in Lawrence as in Lowell, his testimony would aid the county commissioners in determining its value in Lowell. It does not appear that the conditions are not the same, and therefore the petitioner fails to show that the evidence was incompetent. *Petition dismissed.*

WILLIAM T. EUSTIS *vs.* CHARLES H. BOLLES & others.

Suffolk. January 24, 1888. — March 6, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Partnership — Dissolution — Bankruptcy of a Partner — Notice — Evidence — Pleading — Insolvent Debtor — Composition with Creditors — Constitutional Law — Election — Waiver.

The bankruptcy of a partner after a firm has dissolved is as effective notice of the dissolution to a creditor as if it had been caused by the bankruptcy.

Evidence of such bankruptcy to prove such notice is admissible in an action by the creditor against the partner, though not set up in the answer.

A creditor whose debt accrued before the passage of the St. of 1884, c. 236, as amended by the St. of 1885, c. 353, providing for compositions with creditors in insolvency, by accepting the benefit of such a composition, waives his right to object that those statutes are void as to his debt as impairing the obligation of contracts.

CONTRACT against Charles H. Bolles, George F. Wilde, and Francis D. Hall, on a promissory note dated January 1, 1880, payable to the plaintiff or order, and signed by "B. Callender & Co." Writ dated June 9, 1887. The answer of the defendant

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are applicable to and decisive of the case at bar on this point. Neither under the original complaint nor under the amendment could the city show that its assessors had valued and assessed some of the parcels at too small an amount. The rulings of the county commissioners upon this point were therefore correct.

The petitioner before the county commissioners objected to certain testimony of Charles H. Dalton. It appears by the record that the commissioners adopted the proper test, that is, the fair cash value of the property on the 1st of May. They had the right to consider its value for manufacturing, as well as for other purposes. The question whether the witness had sufficient knowledge of the value of property to enable him to give his judgment upon the matter in question, was largely for their determination, and within their discretion, and we cannot see that this discretion was wrongfully exercised. *Swan* v. *Middlesex*, 101 Mass. 173. It is difficult to see how the testimony of the witness as to the market value of the shares of the corporation was admissible upon the issue pending before the commissioners; but it is equally difficult to see, from anything disclosed in the record before us, that its admission was prejudicial to the petitioner. It was not used as a test of the value of the property of the corporation, as in *Chicopee* v. *County Commissioners*, 16 Gray, 38. There was much other evidence as to the value.

A petition for a writ of certiorari is addressed to the discretion of the court; and it has always been the practice, when unimportant evidence has been erroneously admitted, to refuse the writ of certiorari, unless it appears that the petitioner has been prejudiced by its admission, or if it appears that the findings are justified by the other evidence. *Cobb* v. *Lucas*, 15 Pick. 7 *Gleason* v. *Sloper*, 24 Pick. 181. *Farming* [illegible] *Power Co.* v. *County Commissioners*, 112 M[illegible]

Upon the whole case, we are of the [illegible] justice does not require that the w[illegible] vent this case from being used as [illegible] mode of proceeding, we refer to [illegible] brought before us in proper f[illegible] county commissioners shoul[illegible] ings and proceedings. T[illegible]

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Mass. 563. But as all parties are desirous of an early decision of the merits, we overlook the error in form.

In the first case, and in the second case, which is governed by the first, the entry must be *Petition dismissed.*

All the questions raised in the third case, except that as to the admissibility of the testimony of Henry F. [illegible], are considered, and decided in the first case. He was permitted to testify "what mill water power was worth in Lawrence, the conditions which affect the value of water power are substantially the same in Lawrence as in Lowell, and would aid the county commissioners in determining it in Lowell. It does not appear that the conditions are the same, and therefore the petitioner fails to show that the testimony was incompetent. *Petition dismissed.*

WILLIAM T. EUSTIS *vs.* CHARLES E. [illegible]

Suffolk. January 24, [illegible]

Present: MORTON, C. J., DEVENS, [illegible]

Partnership — Dissolution — Bankruptcy.
Pleading — Insolvent Debtor — [illegible]
Law — Election — Waiver.

The bankruptcy of a partner after a dissolution to a creditor [illegible] bankruptcy [illegible] the partner [illegible] debt [illegible]

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Hall was: 1. A general denial. 2. A special denial that he ever made or signed the note, with a demand that the signature be proved at the trial. 3. That on January 1, 1880, he was not a member of the firm of B. Callender & Co. The answer of the defendants Bolles and Wilde, as amended, was: 1. A general denial. 2. Certificates of discharge upon a composition with creditors under the St. of 1884, c. 236, as amended by the St. of 1885, c. 353. The plaintiff demurred to the answer of the defendants Bolles and Wilde, on the ground that those statutes were unconstitutional and void, for the reason, among others, that they impaired the obligation of contracts.

At the trial in this court, without a jury, *C. Allen*, J., overruled the demurrer, and reported the case for the consideration of the full court. The facts appear in the opinion.

C. Reno, for the plaintiff.

J. B. Richardson, for the defendants.

MORTON, C. J. This is a suit upon a note dated January 1, 1880, signed by "B. Callender & Co." It was signed and delivered to the plaintiff by B. Callender, and at that time the only parties composing the firm were the said Callender and the defendants Bolles and Wilde. The defendant Hall, who was formerly a partner, had withdrawn from the firm on July 2, 1877, and notice of the dissolution was given by publication in the Boston Daily Advertiser, but no personal notice was given to the plaintiff. The note in suit was given in renewal of a former note which the plaintiff held at the time of the dissolution.

It further appears, that the defendant Hall, in December, 1877, filed his petition in bankruptcy, was adjudicated a bankrupt, and thereupon, in June, 1878, received his discharge.

Upon these facts, we are of the opinion that the defendant Hall is not liable in this action. The only ground upon which he could be held is that the plaintiff had no legal notice of the dissolution of the firm. If the firm had not been previously dissolved, the bankruptcy of Hall would have dissolved it. The bankruptcy, like the death, of a partner, dissolves the partnership; and, as it is a public and notorious proceeding, all creditors are bound to take notice of it, and no further notice need be given. The publication of bankruptcy or insolvency proceedings

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is legal notice to all persons, by which they are bound. Story, Part. §§ 332–336. *Arnold* v. *Brown*, 24 Pick. 89, 94. *Marlett* v. *Jackman*, 3 Allen, 287. *Butler* v. *Mullen*, 100 Mass. 453.

The plaintiff was a creditor of Hall at the time of his bankruptcy; he is presumed to have had notice of it, and this is notice that at that time the partnership had been dissolved. It is as effective notice that the old copartnership no longer existed as it would be if the bankruptcy itself had worked the dissolution.

The plaintiff objects that evidence of the bankruptcy is not admissible under the pleadings; but the fact is put in evidence, not as a bar to the plaintiff's claim, but as evidence that he had notice of the dissolution, and therefore need not be set up in the answer. We are therefore of opinion that the defendant Hall is entitled to judgment.

The defendants Bolles and Wilde rely upon discharges under our insolvent law. Their discharges were obtained under the St. of 1884, c. 236, as amended by the St. of 1885, c. 353. These statutes made a material change in our insolvent laws. Before they were enacted, an insolvent debtor was obliged to surrender all his property which was not exempt from attachment to his assignee, for distribution among his creditors, and he was entitled to a discharge if he paid fifty per cent of the debts proved, or, if he paid less than that, by procuring the assent in writing of a majority in number and value of his creditors who had proved their claims, to be filed within six months after the date of the assignment. Pub. Sts. c. 157. Under the composition statutes, he may, after his petition and schedules are filed, instead of following the further proceedings of the Public Statutes, c. 157, file "a written proposal for composition with his creditors," setting forth the amount he offers and the times of payment; if he offers fifty per cent or more, he must obtain the written assent of a majority in number and value of all his known creditors to the proposal; if he offers less than fifty per cent, of three fourths in number and value of such creditors; and thereupon the court may order that the composition be confirmed and the amount offered be paid into court. Upon such payment, the court shall grant to the debtor a certificate of discharge from his debts. The debtor retains all his property

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except what is paid into court. The money paid into court is to be paid out by the register to those entitled to it, and if any part is not called for within a year by any creditors it is, after notice to such creditors, to be paid over to the debtor or to the person who deposited it. This is a general outline of the two methods of proceeding.

We assume, in favor of the plaintiff, that the composition statutes above cited, as they undertake to discharge debts due to creditors upon conditions materially different from those existing prior to the time of their passage, are as to such prior creditors unconstitutional, as impairing the obligation of their contracts. But they are not wholly unconstitutional and void. They are clearly valid as to all debts between citizens of the State which accrue after the statutes went into effect; and a prior creditor, if he elects to avail himself of the composition proceedings and to accept their benefits, may waive his right to object that they are invalid as to his debt. The principal question in this case is whether the plaintiff has thus waived his rights.

He proved his debt in insolvency, and voted for assignee; but this he had a right to do, as the proceedings were commenced under the Public Statutes, and if they had been pursued according to these statutes his debt would have been discharged, and he would have been entitled to his share of the debtor's property. After the composition was proposed, at a hearing thereon on March 10, 1887, he objected to it, on the ground that the composition statutes were unconstitutional and void as to his debts. So far it is clear that there was no waiver of his rights. But it further appears, that on May 14, 1887, the plaintiff received the sum of $8,020, being fifty cents on the dollar of his claim, and gave a receipt reciting that it was "according to the composition confirmed by the court in the case," being like the receipts signed by all the other creditors. He thus voluntarily received all the benefits and fruits of the composition. We think that, when the composition was confirmed, he was put to his election whether he would avail himself of the composition offer, or would reject it, and rely upon his right to enforce his debt against the debtors notwithstanding their discharge.

The offer was to pay him fifty per cent, not in part payment

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of his debt, but in full discharge of it. The offer may be an amount larger than could be realized from the debtors' assets if administered in insolvency. The statute contemplates that the money offered may be, and it often is in fact, paid into court by the debtor's friends, and in such case it is paid over to the person who deposited it, if not called for within a year by any of the creditors. It is clearly a violation of the whole purpose and spirit of the composition for any creditor of the insolvent to draw out his share of the money and apply it in part payment of his debt, holding the insolvent liable for the balance. It is unjust to the person who deposited the money. As the plaintiff saw fit to accept the offer, he thus made himself a party to the composition, and such acceptance was inconsistent with the right to enforce the balance of his debt, in violation of the terms of the composition. We are of opinion that he has waived his right to object that the discharge is invalid as to him.

A similar question was decided in *Clay* v. *Smith*, 3 Pet. 411, where it was held that the plaintiff, by proving his debt and taking a dividend under the bankrupt laws of Louisiana, waived his right to object that the law did not apply to his debt, he being a creditor residing in another State.

The plaintiff relies upon the cases of *Kimberly* v. *Ely*, 6 Pick. 440, and *Agnew* v. *Platt*, 15 Pick. 417. The last named case was, as is stated by Chief Justice Shaw in *Beal* v. *Burchstead*, 10 Cush. 523, "decided on the ground that the defendant was not an inhabitant or citizen of New York, and had no right to avail himself of the State insolvent law of that State." The case of *Kimberly* v. *Ely* more nearly resembles the case of the plaintiff. But in regard to both of these cases it must be said that, so far as they uphold the doctrine that a foreign creditor who voluntarily proves his debt, and receives his dividend, in insolvency proceedings before a court of competent jurisdiction, is not barred by the discharge, they are in conflict with the later decisions. The accepted doctrine now is that such creditors waive their right to object that as to their debt the law is unconstitutional. And the same rule applies *a fortiori* to a citizen of this State who elects to prove his debt contracted before the law took effect, and receives all the benefits of the law. *Bigelow* v. *Pritchard*, 21 Pick. 169, 174. *Fisher* v. *Currier*,

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7 Met. 424. *Gilbert* v. *Hebard*, 8 Met. 129. *Clark* v. *Hatch*, 7 Cush. 455. *Marsh* v. *Putnam*, 3 Gray, 551, 565.

We are therefore of the opinion that the discharges of the defendants Bolles and Wilde are a bar to the plaintiff's claim against them. *Judgment for the defendants.*

EDWIN A. ALGER, administrator, *vs.* NORTH END SAVINGS BANK.

Suffolk. January 24, 1888. — March 6, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Practice — Report — Savings Bank — Deposit in Trust — Gift — Evidence.

Upon the report of a case for the determination of this court, whether a judge who tried the case without a jury was warranted in making a finding, the only question is whether there was any evidence to sustain the finding, not whether the evidence is worthy of belief.

Evidence that a savings bank depositor "in trust," who kept the deposit-book, shortly before his death told the person named as beneficiary that the deposit "I put in for you" in the savings bank, "that money is yours," will justify a finding that there was a perfected gift to that person.

CONTRACT, to recover a deposit in the defendant bank by the administrator with the will annexed of George C. Trumbull. Achsie J. Wood intervened as a claimant of the fund, under the Pub. Sts. c. 116, § 31. At the trial in the Superior Court, without a jury, before *Mason*, J., it appeared in evidence that Trumbull, who was treasurer of the defendant bank, in his lifetime made a deposit of $1,000 in the bank in the name of "Geo. C. Trumbull, trustee for Achsie J. Wood"; that the claimant, who had been a housekeeper for Trumbull and his wife for eleven years before his death, contended that the deposit was a gift or payment to her for her services; and that the bank-book was found by the administrator, after Trumbull's death, among his papers.

The claimant testified that during the first year she received for her services four dollars a week, and subsequently three dollars and five dollars; that Trumbull, when she talked with him

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about further compensation, "told me several times that he should provide for me, that I should be well paid as far as money would pay me"; and that in November or December, 1883, "after he made his will, just before the 1st of January, . . . I asked him some question in regard to investing some money in some way, which led him to think I was not feeling satisfied with my wages; and he said, 'You will feel better when you know what I have done for you, Mrs. Wood. I have made my will, in which I have willed you twenty-five shares in the Vermont and Massachusetts Railroad. I have made a will which is deposited with Mr. Alger, in which I left you twenty-five shares of the Vermont and Massachusetts Railroad, and if I live till the 1st of January there will be one thousand dollars in the North End Savings Bank in trust for you, and if I die and leave that as I intend to, you will call for the book, and it is yours'; and he explained at length about the law, how it used to be so that people put in money all they could in their own name, and then deposited it in the names of different members of their family, but he said it was all their money just the same when they died; but he said a very strict law was made at such a time, making it a law that if money was put in in this way in trust by some one, he has control of it while he lives, but if he dies, it goes to whoever it is in trust for; and he said, 'All you have to do is to call for the book, and it will go to you.'"

The claimant further testified, that, later, during the last sickness of Trumbull, when "we were talking business affairs, and I asked him in regard to some money that had been put in trust for a friend of mine, and he explained about it, he said, 'That is on the same principle as the one thousand dollars that I put in for you in the North End Savings Bank'; he said, 'The law is strict in that way, and that money is yours'"; and in reply to the question, "Now, was there any other talk about the money in the bank beside those two conversations?" she said, "No, sir; those two times; he told me just before he died that it was there, and it was mine; that 's all."

On cross-examination the claimant testified that "there was a mutual understanding between Mr. Trumbull and I when I first went there, that I should be paid well, and whatever I thought would satisfy me"; that "there was a nominal price set upon

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for my wages, but it was understood that I was to have a good deal more than that"; that "Mr. Trumbull told me a good many times that he would make a provision for me"; that on one occasion Trumbull said to her, "Achsie, I see you are feeling anxious about your future, and you will feel better when you know what I have done for you"; and proceeded to tell her, "I have made my will, which is deposited with Mr. Alger, in which I have willed you twenty-five shares of Vermont and Massachusetts Railroad stock; if I live until the first of January, there will be a thousand dollars in the North End Savings Bank in trust for you, and if I die, you call for the book, and it will go to you"; and that on one occasion when she asked Trumbull how an old lady of whom she knew could get money that had been deposited in trust for her, he replied, that "it would go to the old lady," and said further, "that is on the same principle as the thousand dollars I put in trust for you."

The counsel for the plaintiff then proceeded to put the following question to the witness: "He said in substance that he had put a thousand dollars in on the same principle; that he had put a thousand dollars in for you, and if he left it there, if he died, as he expected he should —" At this point the witness interrupted the counsel, and said, "No, sir; he did n't at all; he said it was there; the last time he spoke of it he said it was there, and it was mine." The witness further testified, in reply to questions put to her by the counsel for the plaintiff, that Trumbull "told me he had put a thousand dollars in the bank: he said it was in the bank for me, and it was mine"; that "he told me that it was there for me, and it was mine; he offered to give me another thousand, for fear he had n't paid me enough"; but that he never gave her or offered to give her the deposit-book, "or anything of the sort."

The plaintiff testified that he asked the claimant to tell him all that Trumbull ever said to her in regard to the deposit, and that she "replied that he gave her to understand that he had deposited one thousand dollars of his own money in the North End Savings Bank in his name, in trust for her, and that it was to remain his money; he was to take the interest on it and the dividends during his life, and after his death it was to be hers; she spoke of the matter several times, and never varied in regard to

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it"; but the claimant, on being recalled, denied that Trumbull had ever so spoken to her, or that she had ever so replied to the plaintiff.

The judge found for the claimant, and reported the case for the determination of this court, on the question whether the evidence was sufficient as matter of law to sustain the finding.

J. G. Abbott, (*A. B. Alger*, with him,) for the plaintiff.

W. C. Williamson, for the claimant.

DEVENS, J. This is an action of contract for one thousand dollars deposited by George C. Trumbull, the plaintiff's testator, with the defendant bank, Achsie J. Wood intervening as claimant under the Pub. Sts. c. 116, § 31. The judge, before whom the cause was tried without a jury, found for the claimant, and has reported it for the determination of this court, on the question whether the evidence is sufficient in law to sustain this finding.

This sum of money, which was Trumbull's own, was deposited by him in the defendant bank, of which he was treasurer, in his own name, as trustee for Achsie J. Wood. The question presented is whether there was evidence of a perfected gift of the sum thus deposited in his lifetime to Mrs. Wood, or whether it continued under the control and in the possession of Trumbull until his death, and was only intended to become the property of Mrs. Wood in the event that he should see fit to leave it undisturbed at the time of his death. If the deposit was of the latter character, it would be an attempt to make a testamentary disposition of the sum without observing the forms of law, and the administrator would be entitled to the possession of it. *Nutt* v. *Morse*, 142 Mass. 1.

The Pub. Sts. c. 116, § 32, provide that, when a deposit is made by one in trust for another, and when no other notice of the terms of the trust has been given in writing, the deposit may, in the event of the death of the trustee, be paid to the person for whom such deposit is made. But this is intended solely for the protection of the bank, and the rights of those who deem themselves entitled to the deposit are not thereby affected as between themselves.

The difficulty in this case, as in similar cases where deposits have been made by one in his own name as trustee for another,

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is rather in the application of the law to the facts, than in the principles which should govern. The very large number of deposits in the savings banks of this Commonwealth, and the convenience in many instances of adopting this form of deposit, have caused it often to be carefully considered.

While, if Trumbull retained the control over this fund until his death, intending that no title to or interest in it should pass until that time, there would have been no perfected gift, it is also true, that, if he deposited the money in the bank intending it to be at the time a gift to Mrs. Wood, although he himself kept the deposit-book, and informed her of it, and she assented to it, this would be equivalent to a delivery and an acceptance of a chattel on delivery, and the gift would have been perfected. *Scott* v. *Berkshire County Savings Bank*, 140 Mass. 157.

In *Gerrish* v. *New Bedford Institution for Savings*, 128 Mass. 159, it is said that it is enough for the purpose of making a party trustee for the benefit of another "if it be unequivocally declared in writing, or orally if the property be personal, that it is held in trust for the person named. When the trust is thus created, it is effectual to transfer the beneficial interest, and operates as a gift perfected by delivery." It was there held that evidence which the claimants offered of declarations which the testator, the alleged trustee, made to them at different times in language which fairly implied that he intended to give to them an immediate equitable title in the principal fund, reserving to himself only the income for life, should have been admitted.

But a mere declaration of trust by the owner, not communicated to the donee and assented to by him, or a mere deposit of the fund in his own name as trustee, or a deposit in the name of another, will not be of themselves alone sufficient to prove a complete gift or voluntary trust. *Sherman* v. *New Bedford Savings Bank*, 138 Mass. 581, and cases cited.

The case at bar, although the evidence as to the ownership of the deposit is fully stated, does not require us to decide whether we should have found as did the presiding judge who has reported the case, but only whether there was sufficient evidence, as matter of law, to sustain his finding.

If all the declarations were of the character of that first testified to by the claimant, this would be difficult. She testified

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that the compensation she was receiving in the way of weekly wages was nominal, and that it was always understood that some provision would be made for her in addition. In November or December of 1883, Trumbull recited to her the provisions of his will, by which he had bequeathed to her twenty-five shares in the Vermont and Massachusetts Railroad, adding, "And if I live until the first day of January there will be a thousand dollars in the North End Savings Bank in trust for you, and if I die and leave that as I intend to, you will call for the book and it will be yours." The money was not then in the bank, and this conversation only indicates an intention to put it there, and to leave it there so that the claimant might receive it at his death. It is of the same character as the conversations to which the claimant testifies when she states, "Mr. Trumbull told me a good many times that he would make a provision for me." But the statement made by the claimant as to what was said by Trumbull shortly before his death, and after the deposit of the one thousand dollars was actually made, is of a different character. He explained to her (referring to a deposit made by another, and for the benefit of another person than the claimant) that money put in trust in a savings bank for a person would go to that person, saying, "That is on the same principle as the one thousand dollars that I put in for you in the North End Savings Bank"; he said, "The law is strict in that way, and that money is yours." The claimant in her testimony repeated this declaration with some slight change of phraseology, but each time as an explicit statement by Trumbull that the money then in the North End Savings Bank was hers. Thus she states, "He told me just before he died that it was there, and it was mine." To the inquiry, on cross-examination, "He said . . . that he had put a thousand dollars in for you, and if he left it there, if he died as he expected he should," the claimant, interrupting, said, "No, sir; he did n't at all; he said it was there; the last time he spoke of it he said it was there, and it was mine."

These statements, if believed, establish a perfected gift of the one thousand dollars assented to by the claimant. They are made when the money is actually in the bank, and they assure the claimant without qualification that it is hers. There is no

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reason, as matter of law, why the court might not have placed confidence in them. We cannot review the evidence or the argument by which it was sought to show that they were not in fact worthy of credence. *Heywood* v. *Stiles*, 124 Mass. 275.

Judgment on the finding for the claimant.

GEORGE WHITE *vs.* ROSALBA C. STANFIELD & others.

Suffolk. January 30, 31, 1888. — March 5, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Will — Devise — Trust — Heirs at Law — Administrator.

A testator devised a farm, being the only real estate described in his will, to a son, and created several independent trust funds, one of which was for the benefit of his son, directing the trustee to "invest the same in such manner as he shall deem safe and judicious," and to "pay over the net income" to him "during his natural life and the principal of said fund on his death to his heirs at law." Each beneficiary was to receive interest out of the estate, the first payment of which was to be in advance, until his trust fund was formed, and the fund for the benefit of the son was always invested in personal securities. *Held*, that the term "heirs at law" meant next of kin, or persons entitled under the statute of distributions relating to personal estates.

The administrator of a beneficiary for life under a trust is entitled, under the Pub. Sts. c. 136, § 25, to that portion only of the income of the fund which accrued between the last payment to the beneficiary and his death.

BILL IN EQUITY, filed January 14, 1887, by George White, trustee under the will of Henry Robinson, against Rosalba C. Stanfield, Anna E. Robinson, Dora Hidell, and Clifford Brigham, administrator of the estate of Edward Gray Robinson, for instructions as to the disposition of a trust fund.

The bill alleged that Henry Robinson made a will, dated October 14, 1848, which was, with the exception of parts merely formal, as follows:

"I give to my wife Isabella Robinson all my wearing apparel household furniture horses, carriages, plate, watches, and jewelry, and also my library.

"I give to my son Edward Gray Robinson, my farm in the State of Michigan, to have and to hold the same to him his heirs and assigns to his and their use in fee simple.

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"I give to my daughter, Mrs. Rosalba Cecilia Stanfield the sum of fifteen thousand dollars, and if her husband Mr. M. M. Stanfield shall at my decease be indebted to me by note or otherwise either solely or jointly with others, then this bequest shall be applied to the payment of any such indebtment of said M. M. Stanfield.

"I give to William W. Stone and Thomas Lamb, both of said Boston, the sum of fifty thousand dollars to be held by them in trust for the benefit of my said wife during her natural life. They shall invest the same in United States six per cent stock payable in eighteen hundred and sixty-eight if the same can be done on reasonable terms, if it cannot, then in such other manner as they shall judge safe and judicious, and they shall pay the net income of said fund, to my said wife in equal quarter-yearly payments during her natural life for her sole separate and individual use, and upon her decease the principal of said fund shall be disposed of as part of the residue of my estate. The provision which I have herein made for my said wife shall be in lieu and in full satisfaction of her right or claim to dower or thirds from or out of my estate.

"I give to the said Stone and Lamb the further sum of twenty thousand dollars to be held by them in trust for the benefit of my adopted daughter Rosalla Peale (the daughter of the late Rembrandt Peale) during her natural life. They shall invest the same in such manner as they shall judge safe and judicious, and shall pay the net income, of said fund to said Rosalla, in equal quarter-yearly payments during her natural life for her sole separate and individual use, free from the control or interference of any husband with whom she may at any time intermarry, and such payments shall be made only on her own individual receipts or orders, executed on or after the days when they shall respectively become payable and upon her decease the principal of said trust fund shall be disposed of as part of the residue of my estate.

"I give to the said Stone and Lamb the further sum of ten thousand dollars, to be held by them in trust for the benefit of my said daughter Rosalba Cecilia Stanfield during her natural life. They shall invest the same in such manner as they shall judge safe and judicious, and shall pay over to her the net income

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of said fund in equal quarter-yearly payments during her natural life, for her sole separate and individual use, free from the control or interference of her present husband or any husband with whom she may at any time hereafter intermarry, and such payments shall be made only on her own individual receipts or orders, executed on or after the days when they shall respectively become payable; and upon her decease the said trustees shall pay over and distribute the principal of said trust fund to and among her lawful issue the lawful issue of any deceased child of my said daughter taking their parent's share. But if my said daughter shall leave no lawful issue living at the time of her death, then the said trustees shall pay over and distribute the principal of said trust fund to and among her heirs at law.

"I give to the said Stone and Lamb the further sum of fifteen thousand dollars, to be held by them in trust for the benefit of my three grandsons Henry Hugh and George the sons of the said Rosalba Cecilia Stanfield. The said trustees shall invest the same in such manner as they shall judge safe and judicious and they shall expend the net income of the said fund quarter-yearly for the maintenance and education of my said grandchildren until they shall respectively attain the full age of twenty-one years, and as each one attains that age they shall make over to him one equal third part in value of the principal of said fund, but if either of them shall die under that age his share shall go in equal parts to the survivors or the whole to the survivor if only one shall live to reach that age, such additional share or shares not to be paid to him or them until he or they respectively shall reach the said age of twenty-one years, provided however that if my said daughter should have other children born to her they shall have the benefit, in equal proportions among themselves, of the share or shares, of any one or more of my said three grandsons who may die under the age of twenty-one years in the same manner that such deceased grandson or grandsons would have if living, but if only one of my said three grandsons should live to become twenty-one years of age, and only one after-born child of my said daughter should live to reach that age, then the principal of said trust fund shall be divided between them equally, their respective shares to be paid them when they become twenty-one years of age. But if no child of my said daughter shall live to become twenty-one

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years of age, then the principal of said fund shall be disposed of as part of the residue of my estate.

"I give to my nephew John Henry Towne of Philadelphia the sum of twenty thousand dollars to be held by him in trust for the benefit of my son Charles Robinson during his natural life. He shall invest the same in such manner as he shall judge safe and judicious, and shall pay over the net income of said trust fund to my said son Charles in equal quarter-yearly payments during his natural life, and the principal of said fund upon his decease to his heirs at law.

"I give to said John Henry Towne the further sum of ten thousand dollars to be held by him in trust for the benefit of my son William Gwynn Robinson during his natural life. He shall invest the same in such manner as he shall judge safe and judicious, and shall pay over the net income of said trust fund to my said son William Gwynn in equal quarter-yearly payments during his natural life, and the principal of said fund upon his decease to his heirs at law.

"I give to said John Henry Towne the further sum of ten thousand dollars to be held by him in trust for the benefit of my son Edward Gray Robinson aforenamed during his natural life. He shall invest the same in such manner as he shall judge safe and judicious and shall pay over the net income thereof to my said son Edward Gray in equal quarter-yearly payments during his natural life, and the principal of said fund on his decease to his heirs at law.

"I give to the parties who may be entitled to the income of the several trust funds aforesaid, to each of them a sum equal to one quarter-year's interest in advance on their respective funds, said sums to be paid to them as soon as may be after my decease, with interest on said sums from the day of my death until paid. It is also my intention that the said parties shall receive full interest on the amounts of their respective funds at the expiration of each quarter after my decease, and therefore until the aforenamed trustees shall have received from my executors the full amounts which they will be entitled to claim for the establishment of the said several funds, I direct my executors at the expiration of every three months after my decease to pay to each of the said parties any deficiency there may be in the

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income of their respective funds to make up full interest on the respective sums which I have directed shall be invested for their benefit.

"I also give to the aforenamed Stone and Lamb the further sum of twenty-five thousand dollars, to be held by them in trust for the benefit of my brother, Mr. John Robinson, and my sister Mrs. Hannah Ganott, both of Coventry, England, during their joint lives. The said trustees shall invest the said sum in such manner as they shall judge safe and judicious, and during the joint lives of my said brother and sister they shall pay over to my said brother two thirds of the net income of said trust fund, and to my said sister one third part of said net income, in equal half-yearly payments, and upon the decease of my said brother two thirds of the principal of said trust fund, and upon the decease of my said sister one third part of the said principal shall be disposed of as part of the residue of my estate, and upon the decease of either of them the remaining two thirds or one third part of the same trust fund, as the case may be, shall continue to be held in trust by the said trustees, and the net income thereof shall be paid to the survivor of my said brother and sister, during his or her natural life. All sums to be so paid to my said sister are to be for her sole separate and individual use free from the control or interference of her present husband or any husband with whom she may hereafter intermarry, and shall be paid only on her individual receipt or orders, executed on or after the days when the several sums to be paid her shall become severally due and payable.

"It is my will that neither of the said trustees shall be required to give bond for the faithful discharge of the duties of the said trusts or either of them. They shall have authority from time to time to change the mode of investment of the several trust funds committed to them respectively as they shall judge judicious, they shall not either of them be accountable for any loss, or diminution in value, which may happen or accrue to either of the said funds by reason of any error of judgment on their part. The said Stone or Lamb shall neither of them be accountable for the acts or doings of the other, and each of the said trustees shall be accountable only for his own actual receipts, and his own wilful defaults.

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"All the rest, residue, and remainder of the property and estate of which I may die seised or possessed, including the reversions of the several trust funds aforesaid, which I have directed shall be disposed of as part of the residue of my estate, I give, devise, and bequeath to my son, George Mosher Robinson, to have and to hold the same to him, his heirs, executors administrators and assigns to his and their use and behoof forever, provided however, and it is hereby declared that this bequest is contingent as to the several reversions of the said trust funds and as to each of the said reversions, the same shall not vest in the said George unless he shall survive the party or parties upon whose decease the said reversion shall fall into the residue of my estate, and if the said George shall not be living when any one or more of the said reversions shall fall in, then I give and bequeath such reversion or reversions to the lawful issue of said George, who may be then living, the lawful issue then living of any deceased child of the said George taking their parent's share. But if neither my said son George nor any lawful issue of said George shall be living at the time of the falling in as aforesaid of any one or more of the said reversions, then from the amount of such reversions, I give the sum of ten thousand dollars to my adopted daughter the aforenamed Rosalla Peale, the sum of ten thousand dollars to my nephew Henry Robinson of Glasgow Scotland, son of my brother John Robinson aforenamed. The sum of ten thousand dollars to my said wife Isabella Robinson, and the sum of ten thousand dollars to each of my three grandchildren, Henry, Hugh and George sons of my aforenamed daughter Rosalba Cecilia Stanfield, making in the whole, the sum of sixty thousand dollars thus charged upon the said reversions in case of the death of my said son George and failure of his issue as aforesaid, and if there shall afterwards be any surplus, remaining of said reversions, or either of them, I give the same to my nephew the aforenamed John Henry Towne. But if there shall not be a sum sufficient to pay said six bequests in full of ten thousand dollars each, then they shall be abated equally, and in case any one or more of the said seven legatees shall die before the happening of the contingencies which would entitle them to receive the said sums so bequeathed to them, then it is my will, that

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his, her, or their legal representatives whether legatees or heirs at law shall stand in his, her, or their stead in all respects and be entitled to demand and receive the said several sums in the same manner that he she or they would if living and if by reason of depreciation in value or from any other cause, there shall not be realized from my estate, an amount sufficient to pay in full the legacies herein given and to establish in full the several trust funds which I have directed shall be created, and leave besides a surplus of ten thousand dollars, for my son George Mosher Robinson as residuary legatee, then and in such case, a ratable abatement shall be made from the said several trust funds, except the fund for the benefit of my wife, (which is at all events to be made up to the full amount of fifty thousand dollars,) to such extent as may be needful to secure to my said son George as residuary legatee the full sum of ten thousand dollars. And if such abatement shall be made, from the said trust funds, then upon the death of my said wife and my said adopted daughter, Rosalla Peale, or either of them, the principal of their respective trust funds shall be appropriated as far as need be to make up and restore to the several funds so reduced the amounts so abated, from them respectively with interest thereon from the time of my death, before the said principal of said funds, or either of them, or any part of the same shall be paid to the person or persons who may then under the foregoing provisions be entitled to receive the same."

The bill also alleged, that this will was duly admitted to probate on November 27, 1848; that John Henry Towne was duly appointed trustee under the will on December 17, 1849; that as trustee he received the sum of $10,000 in shares of stock and cash from the executor of the will, and invested it in personal securities, paying the income thereof to Edward Gray Robinson as directed by the will; that Towne died in April, 1875, and the plaintiff was on January 10, 1876, duly appointed trustee under the will; that the plaintiff as such trustee received from the executor of Towne the capital of the trust fund in personal securities and cash; that he had invested it in mortgages, and it amounted to the sum of $11,420.25, the income of which had been paid to Edward Gray Robinson each year during his life, the last payment having been made to him on July 1, 1886; that Edward

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Gray Robinson died on October 16, 1886, leaving a widow, Anna E. Robinson, a sister, Rosalba C. Stanfield, and a niece, Dora Hidell; that Clifford Brigham had been appointed administrator of the estate of Edward Gray Robinson; and that these were the only persons who claimed to be heirs or legal representatives of Edward Gray Robinson, or entitled to receive the fund.

The bill further alleged, that Brigham, as administrator, claimed the whole of the trust fund, both principal and interest; that the wife claimed the whole of the trust fund, except the income accruing between July 1 and October 16, 1886; and that the sister and the niece each claimed one half of the fund, except the income accruing between the same dates.

The prayer of the bill was that the plaintiff might be instructed as to what parts of the fund, if any, the defendants were entitled.

The answer of the defendant Brigham alleged that he claimed that the income of the trust fund accruing between July 1, 1886, and October 16, 1886, should be paid to him as personal property of Edward Gray Robinson of which he died intestate, "and as to the principal of said trust fund, this defendant submits to such order or decree as to this honorable court shall seem meet and proper."

The answer of the wife admitted the allegations of the bill, "excepting that she claims to receive from complainant only one half of the principal of said trust fund."

The answers of the sister and niece each admitted the allegations of the bill.

Hearing upon the bill and answers before *C. Allen*, J., who reserved the case for the consideration of the full court.

J. A. Loring, for the wife.

H. D. Chapin, for the sister.

W. C. Loring, for the niece.

G. B. Ives & C. Brigham, for the administrator, filed a brief.

DEVENS, J. The case at bar has been argued somewhat at cross purposes by the counsel who have respectively represented before the court, on the one side, the widow, and on the other, the sister and niece of Edward G. Robinson.

The claim as made on behalf of the widow is, that the fund of $10,000 of which the testator's son Edward G. was to have

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the income during life is to be treated as a gift of personal property upon his decease to those who were then his next of kin or his distributees, and that by the words "to his heirs at law" the testator intended to designate those who would have taken as the distributees of his personal property had the fund actually been the property of Edward G. at his decease; and thus, as he left a widow, but no issue, she is entitled to one half thereof as his personal property, such being the law of Massachusetts when the will was made and when the testator died. By the law as it now exists, the widow in such case is entitled to $5,000 of the personal property of the husband and one half of the excess above $10,000. These sums amount together to the sum of $5,710.12, which is the same amount as one half of the personal property; so that this change in the law as applied to the case at bar makes no difference in the amount to be received by the beneficiary, if the claim on her behalf is maintained.

On behalf of the sister and niece it is urged that the words "heirs at law" cannot be interpreted as meaning next of kin or distributees; that they apply solely to the realty, and designate as those who are to take the fund in controversy those who at the decease of Edward G. were entitled to estates of inheritance in his real property; that by the law in force when the will was made and when the testator died the widow did not inherit any part of her husband's real estate, but it would have been divided between his sister and his niece, so that she cannot have been designated as an "heir at law"; and that although by the law in force (St. 1880, c. 211) when Edward G. died his widow would have been entitled to his real estate to the amount in value of $5,000 and an estate for life in his remaining real estate in lieu of dower, the will must be construed by the law which prevailed when the will became operative. It was further urged, that even if this is not so, and if the present law is to govern in determining what persons come within the meaning of a gift to "heirs at law," the St. of 1880, c. 211, did not make the widow in any proper sense an heir of her husband, as it did not cast upon her an estate of inheritance in his lands upon his decease, but gave her only a right to a certain provision to be made therefrom.

While it has not been urged on behalf of the widow that she was entitled to take as one properly designated as an heir at law

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by virtue of the statute of 1880, but her claim has been rested upon the ground of her rights to which she would be entitled as distributee in the personal property of her deceased husband, and while the amount which she would receive in the two events would differ, it is to be presumed that this claim might be made on her behalf if that originally made by her is rejected. It does not appear by the bill for instructions and the answers thereto to have been distinctly set forth, but these are of course susceptible of amendment, and it might be necessary to consider it unless the widow shall be found entitled on the ground first taken on her behalf.

An examination of the will leads to the conclusion that the testator intended that the sum of $10,000 should be dealt with as personal property during the lifetime of his son, and that it should be distributed as such at the decease of the son, unless the use of the words "heirs at law" in describing those to whom it is to pass shall compel us to hold otherwise. The only real estate described in the will of the testator was a farm in Michigan, which he devised to Edward G. The instrument contains several distinct and independent trusts, which consist of funds to be held for the benefit during life of certain *cestuis que trust*, and which at their decease respectively are variously disposed of.

The trust for the benefit of Edward G. was the sum of $10,000, to be held by the trustee during the natural life of Edward G., to pay to him the income thereof, and "to pay over . . . the principal of said fund on his decease to his heirs at law." The fund was to be invested by the trustee as he might think safe and judicious, but there is no suggestion that it should be invested in real estate, nor do we find anything looking to its division as such. The parties entitled to the income of the various funds were to receive "a sum equal to one quarter-year's interest in advance on their respective funds," and, as there might be delay after the decease of the testator in the formation of such funds, the beneficiaries for life were until that time to receive quarterly full interest on the amount of their respective funds. The fund created for Edward G. consisted of personal securities, and has always remained thus invested. It is fairly to be inferred from the direction that the fund should be paid over on the decease of

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Edward G., from the fact that interest is to be paid on an equal amount until the fund is formed, and from the other circumstances of the case, that it was to be kept and dealt with as personal property.

Where, even in the case of a gift of personal property at the decease of one who was to enjoy a life income therefrom, it was clear that the testator intended that "heirs at law" strictly so termed should take the property from which such income was drawn, they would so take, not as such, but as persons whom the will described, and who might be described by the class to which they belonged as well as by their names. Where a gift of the income of personal property has been made, and then such property is bequeathed to "his heirs," or his "heirs at law," many English decisions have held that those who are strictly so must take to the exclusion of the next of kin or distributees. *Smith* v. *Butcher*, 10 Ch. D. 113. *Low* v. *Smith*, 2 Jur. (N. S.) 344. *De Beauvoir* v. *De Beauvoir*, 3 H. L. Cas. 524.

Such has not been so clearly the tendency of the decisions in Massachusetts, which have paid more regard to what seemed the intention of the testator, and, ascertaining this, have endeavored to follow it. While words must certainly receive the sense which they ordinarily have, yet it may be shown by the context that the testator has sought to impress upon them a different sense, and if so, this will then be followed. *Minot* v. *Harris*, 132 Mass. 528. In *Loring* v. *Thorndike*, 5 Allen, 257, where a bequest of personal property was made by a codicil in lieu of a devise of real estate to the same person in the will, and this was so expressed in the codicil, it was held that the intention of the testator was clearly indicated that the word "heirs" as applied to the personal property should bear its legal sense. But in *Houghton* v. *Kendall*, 7 Allen, 72, where the gift was of a sum of two thousand dollars at the decease of one entitled for life to the income thereof, it is said: "In this Commonwealth we find no authority which would conflict with the adoption of the construction which seems to us reasonable, that when the word 'heirs' is used in a gift of personalty, it should primarily be held to refer to those who would be entitled to take under the statute of distributions, and to indicate that they should take in the same manner and in the same proportions as if it had come to them as

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intestate estate of the person whose 'heirs' they are called." Upon this ground the case is decided. To the same effect is *Sweet* v. *Dutton*, 109 Mass. 589.

The sister and the niece rely much on the cases of *Merrill* v. *Preston*, 135 Mass. 451, and *Fabens* v. *Fabens*, 141 Mass. 395. In *Merrill* v. *Preston*, the will in terms authorized "the fund to be invested in real estate, and looked to its possible division in that form," although it was personalty when it was handed over. But it is said, "If the deed before us had contemplated a trust of personalty only, there would have been a stronger, although not necessarily a conclusive, argument in favor of construing an ultimate limitation to heirs in a sense adapted to the mode in which personal property devolves." *Fabens* v. *Fabens* belongs to the same class of cases as *Clarke* v. *Cordis*, 4 Allen, 466, and *Lombard* v. *Boyden*, 5 Allen, 249, in which it is held that where real and personal estate are blended in a single provision, and the rents, profits, dividends, and income are to be paid to one for his life, and at the death of the life tenant the trustee is to convey and pay over the same to his legal heirs, there being no indication that more than one class is intended, or that the two kinds of property are to go in different directions, the whole property will go to those who are technically described as "heirs." In *Fabens* v. *Fabens* the trust property devised and bequeathed consisted of real and personal estate, the life income of which went to the wife and children of the testator. The language of the court is: "The heirs of the children do not take in their parents' place, by way of substitution to the same estate, but they take an independent, substantive gift of the whole property, subject to a life interest therein which is given to the testator's wife and children. There is nothing in the will which shows any intention that the real estate should go in one direction and the personal in another. The provision is a single one, and is found at the beginning of a separate paragraph."

In the case at bar those who are to take after the life estate do not take by way of succession or substitution, but an independent substantive gift; but that which they are to take is personal property, intended to be kept as such, and thus to be paid over at the decease of the life tenant, and notwithstanding the use of the words "heirs at law," it should be paid to his distributees,

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and one half thereof to his widow, as a person so entitled under the statute. The words do not appear to have been used technically, nor would it have occurred to a testator, unless his attention had been called to it by legal advice, that he was in danger by use of them of sending this property in a different direction from that it would have taken if it had actually been the property of his son. Indeed, his object was not, we think, so much to make an additional bequest after providing carefully for the income of his son for life, as to relinquish the property from which it was derived to the disposition of the law. It is said in *Minot* v. *Harris*, *ubi supra*, that "the phrase used by the testator," who had bequeathed his property to his wife for life, and at her "decease 'to my legal heirs as the law provides,' while redundant, shows an intention to refer the subsequent disposition of his estate to the law as it exists, and of which the statutes form a part." Where a testator establishes a fund consisting of personal property for the purpose of providing an income for life for his son, and this is apparently his principal object, and when after his son's decease he directs it to be paid over to the son's "heirs at law," his intention is not so much to make a bequest of it, or direct further how it shall go, as it is to surrender the disposition of the fund, as if it were actually the son's, to those upon whom the law would in such case devolve it.

As in our view the fund is to pass as personal property, it will be unnecessary to consider what would be the character of the widow's estate therein if treated as real property.

While the bill sets out that the administrator of Edward G. Robinson claims the whole estate, this was not seriously contended. He is entitled to that portion of the income of the fund which accrued between July 1 and October 16, the day of the life tenant's death. Pub. Sts. c. 136, § 25. *Adams* v. *Adams*, 139 Mass. 449.

The widow as distributee of the personal property is entitled to one half the trust fund, and the sister and niece respectively to one quarter. *Instructions accordingly.*

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EDWARD B. HOLT *vs.* JOSEPH BENNETT & others.

Suffolk. January 16, 1888. — March 7, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Corporation — Creditor — Payments to Directors — Fraud.

Payments made by a corporation, intending in good faith to go on and develop valuable patents owned by it, to its directors of money borrowed from them in the ordinary course of business, are not recoverable from such directors by a creditor of the corporation whose debt at the time was not due and payable.

DEVENS, J. This is a bill in equity, in which a creditor of a corporation, the Purifying and Maturing Process Company, seeks to have a certain mortgage made by it declared fraudulent, and the individual defendants, who were its directors, and two of whom were also creditors, decreed to pay the debt owing to the plaintiff. Whether the plaintiff is entitled as a creditor to maintain such a bill on his own behalf, neither joining other creditors nor making the corporation a party, even if the mortgage transaction by which its assets were transferred was a fraudulent one, and also whether, the mortgage having been heretofore held valid in a suit at law in which the defendant Cushing was summoned by the plaintiff as trustee, the plaintiff is now estopped to assert otherwise, are questions which, although raised and discussed, we shall have no occasion to decide.

The case has been referred to a master, and the facts as reported by him do not show that the plaintiff has any just cause of complaint. On December 28, 1881, the corporation owed one Hayden $1,000, and two of the directors now sued had indorsed the note; it also owed Cushing, one of the directors, $1,350, and the secretary, Burgett, $450; all of which indebtedness was contracted in good faith, and in the ordinary course of business. It also owed the note held by the plaintiff, but the same was not due and payable until four months thereafter. On the same day the treasurer was authorized to borrow $6,000 for the use of the corporation, to give its note or notes therefor, to obtain the necessary indorsers thereon for the security of the loan to the lender, and to convey the stock and assets of the corporation, or

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such part thereof as might be necessary, to some person as trustee, the same to be held as collateral security to indemnify and save harmless the indorsers of the proposed note or notes. A promissory note was executed to Hayden, who advanced the $6,000, signed by the directors of the corporation, including Cushing, and the treasurer of the corporation made a conveyance of the stock, goods, and assets of the corporation to Cushing, in trust to hold, sell, or dispose of the same in order to pay the note of $6,000, and indemnify and save harmless the indorsers thereon.

This $6,000 was practically all that ever came to the hands of the corporation after December 28, 1881. It was used partly to pay the debts of the corporation then due, and it may be inferred that it was intended it should be so used when the loan was negotiated. These debts were those heretofore stated as due to Hayden, Cushing, and Burgett. It does not appear that any others existed. They amounted in the aggregate to $2,800. The remainder was used to purchase materials and to defray the legitimate expenses of the corporation before the complainant's note matured. The whole transaction is found to have been done in good faith, with the intent to put the corporation on a better footing, to go on with its business and develop its patents, which were deemed to be valuable.

Although the corporation failed to pay the plaintiff's note when it became due, we can see no ground upon which to charge the defendants, who were the directors at the time of this transaction, or those whose debts were thus paid, with any liability to the plaintiff. The property conveyed in trust to Cushing, so far from being in excess of the $6,000 borrowed, proved, at a sale where its full market value was obtained, to be worth only $5,046; so that no case is presented where the trustee has received any security in excess of the liability incurred. Even if, when this deed was made, the property of the corporation, outside of the value of the letters patent possessed by it, was insufficient to pay its debts in full, the process patented was honestly believed to be of great value, and indeed has since been made successful, although by another corporation.

The position of the plaintiff appears to be, that a corporation intending in good faith to proceed with its business, and to render

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the patents available which it possesses, cannot pay its directors money which it has borrowed from them in the ordinary course of business without rendering them responsible for the amount which they thus receive to any of its creditors whose debts may then be owing from it, although not then due and payable. This is quite untenable. The cases cited by the plaintiff, which hold that where a corporation is insolvent it cannot make conveyances of its property in contemplation of such insolvency, for the security of its directors who are also its creditors, to the exclusion of others, do not require examination or discussion. They have no relation to a case like that at bar. There was no reason why this corporation should not conduct its business in the ordinary manner, even if incidentally debts for borrowed money were paid to its directors, this being done fairly and in its prosecution of the object for which it was formed. Nor was there any reason why the plaintiff should have his debt paid in advance because the money of the corporation was being used to pay debts then payable, to purchase materials, and to defray other legitimate expenses. *Bill dismissed.*

Z. S. Arnold, for the plaintiff.

C. F. Perkins & A. M. Lyman, for the defendants.

JOHN MAY *vs.* WINTHROP M. B. HAMMOND & another.

Suffolk. January 20; February 13, 1888. — March 7, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Poor Debtor — Debt — Promissory Note — Indorser — Evidence — Record — Amendment.

The contingent liability of the indorser of a promissory note is a "debt" within the Pub. Sts. c. 162, § 17, cl. 5, which may be contracted "with an intention not to pay the same."

Oral evidence of a magistrate, before whom the examination of a poor debtor is had, is inadmissible to contradict his record.

TWO ACTIONS OF CONTRACT upon poor debtor recognizances, entered into under the Pub. Sts. c. 162, § 28, by the first-named

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defendant as principal, and the other defendant as surety, and containing the usual conditions. The cases were tried in the Superior Court, before *Bacon*, J., who allowed a bill of exceptions in each case, which, so far as material, was as follows:

It appeared in evidence that Hammond was duly arrested upon an execution in favor of the plaintiff, judgment having been recovered against him as indorser of a promissory note made to the plaintiff by one Ames. The affidavit of the plaintiff, upon which the certificate of the magistrate authorizing the arrest was issued, set forth that the plaintiff believed, and had "good reason to believe, that the debtor, Winthrop M. B. Hammond, has property not exempt from being taken on execution, which he does not intend to apply to the payment of the judgment creditor's claim; and further, that I believe and have good reason to believe that the debtor, Winthrop M. B. Hammond, contracted the debt with an intention not to pay the same." The judge refused to rule, as requested by the defendants, that the liability of an indorser is not a "debt" within the meaning of the Pub. Sts. c. 162, § 17, cl. 5, and that the charge contained in the affidavit upon which the certificate of arrest was issued, that the debtor contracted the debt with an intention not to pay the same, did not apply, and that the arrest was invalid, as the first charge alone did not authorize an arrest.

The magistrate before whom Hammond delivered himself up for examination was permitted to testify that a hearing was appointed for July 25, 1885, at nine o'clock; that before the expiration of the hour, Hammond's attorney, who was present, stated that his client would be present, and moved that the hearing be kept open for him to come in, or be adjourned; that while this motion, which the witness admitted he entertained at the time it was made, was being argued, and before any default had been entered, except in the magistrate's "mind," the defendant came in, at six minutes past ten o'clock; and that he stated at the time of the discussion that he had no jurisdiction in the case after ten o'clock, which point was combated by the attorney. The magistrate's record showed that Hammond was defaulted because he did not appear personally within the hour. The judge ruled, upon the plaintiff's objecting to this evidence, that oral evidence outside of the magistrate's

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record was inadmissible to contradict it, and directed a verdict for the plaintiff in each case. The defendants alleged exceptions.

S. J. Elder, for the defendants.

B. C. Moulton, for the plaintiff.

C. ALLEN, J. 1. The Pub. Sts. c. 162, § 17, cl. 5, include the liability as indorser of a promissory note.

2. It is true that the statutes do not, in express terms, require magistrates who hear applications for the discharge of persons arrested on mesne process and execution to keep records of their proceedings, but, as they act in a judicial capacity, it is proper for them to keep such records, and such records when so kept are to be taken as their official statement of what they have done, and are the proper evidence thereof; and it is competent for such magistrates to amend their records, and when amended such records are evidence of the truth of what they contain. *Henshaw* v. *Savil*, 114 Mass. 74. *Lincoln* v. *Cook*, 124 Mass. 383, and cases cited. It results from this that the oral testimony of such a magistrate is incompetent, upon a trial, to contradict his record. If the record fails to express the truth, the proper course is to amend it. *Sewall* v. *Sullivan*, 108 Mass. 355. *Cook* v. *Berth*, 108 Mass. 73, 77. In the present case such a record was kept, and was put in evidence, and the ruling of the court was correct that the oral testimony of the magistrate was inadmissible to contradict it. That record showed that the debtor was defaulted because he did not appear personally within the hour; and, as it stands, a verdict was properly ordered for the plaintiff.

Exceptions overruled.

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THOMAS H. BOARDMAN & another *vs.* BOSTON MARINE INSURANCE COMPANY.

Suffolk. January 20, 1888. — March 12, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Marine Insurance — Freight — Abandonment — Total Loss — Cargo — Evidence.

A loss of more than half a cargo of coal *in specie* by perils insured against authorizes the abandonment and a claim for a total loss of freight, insured under a valued policy, though the actual freight lost and the cost of forwarding the cargo left is less than one half the valued freight.

In an action on such a policy upon freight on a cargo of two hundred and seventy-four tons of coal, also insured by the defendant, there was evidence that the defendant had paid the owners of the cargo as for a total loss; that forty or fifty tons were thrown overboard to save the vessel; that "great seas" washed some coal out of her; that thirty to forty-five tons were lightered; that a "very little" was used by the steam pumps of a wrecking company; and that she was not further discharged until she reached a port, where forty tons remaining were taken out of her. *Held*, that a jury would be warranted in finding that more than half the cargo was lost by perils insured against.

CONTRACT upon a policy of insurance on freight of the schooner Theresa. Trial in the Superior Court, before *Brigham*, C. J., who reported the case for the determination of this court, which, so far as material, was as follows.

The policy, which was taken out by the plaintiffs, who were the owners of three fourths of the vessel, for the benefit of all the owners, was for "twenty-five hundred dollars on freight on board or not on board sch. 'Theresa,' from September 19th, 1885, to September 18th, 1886, both days inclusive, ... freight valued at $2,500 unless a larger amount at risk, then at actual freight," and contained the following printed clauses, the blank used being that habitually used by the defendant for policies on vessels or freights:

"It is further provided that the insurers shall not be liable . . . . for any loss of freight on ice or lime, unless the entire quantity shipped shall be destroyed because of stranding, sinking, or fire; nor for any loss of ice in general average except it be occasioned by jettison, and in all cases of loss by jettison the same shall be settled on the principle of general average only, but shall not be liable for general average, or general contribu-

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tion, in case of the jettison of the deck load. And in case of claim for loss or damage, there shall be deducted from the cost of metal, sheathing, calking under the metal or sheathing, and docking, first the value of the old metals and nails, and from the remainder two and a half per cent for each month that the metal or sheathing shall have been on said vessel when the same is taken off, and if it has been on three years, the cost shall be wholly borne by the insured; and from all other repairs, except upon anchors, there shall be deducted one third. And it is agreed, that the insured shall not have the right to claim for total loss on account of the estimated amount of repairs exceeding the valuation of the vessel, nor under any circumstances to abandon, provided the vessel remain *in specie*, unless the amount which the insurers would be liable to pay (exclusive of all general average charges, and charges for getting off or raising and bringing into port a vessel stranded or submerged, and of all repairs consequent upon decay) under an adjustment, as of partial loss, after making all the usual deductions, including the proportion or whole of cost of remetalling, docking, and calking, as provided for in this policy, shall exceed half the value of said vessel, as declared in this policy; and the highest valuation under which the vessel is insured, in any policy, shall be the basis for ascertaining a technical total loss of freight under this policy. It is also agreed that the assured shall not have the right to abandon, or to claim total loss of, freight upon goods perishable in their own nature, unless the vessel carrying said goods shall be actually or technically a total loss according to the terms of this policy, or the goods themselves be totally lost caused by sinking, stranding, burning or collision with another vessel. It is also further agreed that voyage policies on freight on board or not on board shall attach at the first port specified, as soon as the inward cargo is landed, and no sooner, whether the vessel be under charter or not, and shall terminate at port or ports of destination with the landing of cargo, in proportion as amount hereby insured bears to full amount of freight or charter for the whole voyage insured. Time risks on freight shall attach and terminate in the same manner, applying to each cargo (or voyage, if in ballast and not chartered) successively, or to each charter successively in case vessel be chartered."

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The vessel was insured by three policies in companies other than the defendant, the valuation in each policy being $8,000. On December 22, 1885, the schooner sailed from Philadelphia for Newburyport with a cargo of two hundred and seventy-four tons of coal, at a freight of $1.90 per ton, including discharging, or $1.65 per ton without. The cargo was insured by the defendant for the consignees, who were the owners.

While on this voyage the schooner, on January 5, 1886, in a heavy gale, dragged both anchors, and went ashore on a bar near Hyannis. On the same day an ineffectual attempt was made by wreckers to get the vessel off, and on January 7 a further attempt was made by the Boston Tow-Boat Company under a contract, but on January 9 a violent gale compelled the company to leave her and abandon the contract, under the belief that she was going to pieces. On January 9 the owners of the cargo abandoned it to the defendant, and on January 16 the defendant, having at first declined to accept the abandonment, paid them in full, as for a total loss of the cargo. The plaintiffs on January 10 abandoned the vessel to the insurers, who, after declining to accept the abandonment, paid them in full, as for a total loss under their policies. On the same day the plaintiffs by telegram also abandoned the freight to the defendant, and confirmed their abandonment of it by letters on January 11 and 12; but the defendant replied, "In absence of proof of the loss, we decline to accept the abandonment."

On January 21 another contract was made by the underwriters, on vessel and freight, with the Boston Tow-Boat Company, to get the vessel and cargo off, and deliver them at Hyannis, and on February 3 the company succeeded in bringing her into the harbor of Hyannis, with some part of her cargo remaining on board. She was brought in full of water, and, after going in as far as she could go, was left on the bottom. On February 4, 1886, the defendant, after paying the owners of the coal as for a total loss, wrote the plaintiffs a letter, signed by its vice-president, as follows: "As the coal is full of sand, it will not pay to bring it to destination. If I abandon it to you for its frt., you would not get full frt. for it. In order to stop expense on it, I am willing to take it at Hyannis, if you will make a proper reduction of frt. What will you take off, and have

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voyage end where she is?" To which letter the plaintiffs replied, on February 6, 1886: "We are in receipt of your favor of 4th inst. In the matter of sch. Theresa and her cargo, as we do not consider ourselves the owners of the vessel, having, upon January 11th, abandoned her and her freight to the underwriters, you will see the impropriety of our discussing with you the question of what shall be done with vessel or her cargo."

On the same day the defendant wrote to the owners of the cargo, "Please send me the B–L of the coal, as I propose to sell it; the buyer will require it." The owners thereupon sent the defendant the bill of lading, as requested. On March 15, 1886, the vessel, the cargo having been first removed from her, was taken to New Bedford for repairs, and afterwards sold by the insurers.

A shipbroker testified: "A fair coal freight from Hyannis to New Bedford for the cargo of the Theresa, supposing the vessel not to be under water, and the cargo to be at the port of Hyannis, knowing what I do about it, would be — I should have wanted something like $2.25 a ton. I am figuring this coal in good condition. I suppose it would cost 25 cents a ton for loading it from the wharf, 6 cents for trimming, and 25 cents for discharging, and this is included in the $2.25." On cross-examination he testified: "The lowest rate of freight in January would be $2.25, whether a vessel was already at Hyannis or sent there. The danger of season makes that rate. In the summer I think it could be carried at the ordinary rate, $1.25."

Lincoln F. Baker testified: "I was the wreck-master for the Boston Tow-Boat Company. Have been in that business six years, and had experience in the wrecking of vessels. I first heard of this wreck at Boston, January 5. I telegraphed to the Storm King, our tug-boat, then at Wood's Holl, to proceed to the wreck immediately with our steam lighter. I went to the wreck on the morning of the 7th, met Mr. Boardman, the owner, and made the contract with him for $2,000 to deliver vessel at Vineyard Harbor or New Bedford; no success, no pay. I hired some men ashore, not having sufficient men aboard, and went on board the schooner at once; we hauled the lighter alongside; the steam pumps were already aboard the lighter; the Storm King lay alongside the lighter. We put the steam pump down

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the fore hatch; that was the only place it was valuable, the main hatch being full of coal. Immediately after making fast, in the afternoon of the 7th, we started the pump and began to throw coal overboard. We threw the coal over from the main hatch; this was done to lighten the vessel as fast as possible. We worked till towards midnight on the 7th, and again on the morning of the 8th. It was impossible to keep the main pump down in the main hatch till we took out coal enough to let the suction pipe go down. The first of this coal we threw overboard. In the morning of the 8th, we began to put coal on the lighter's deck; about noon we placed the second pump alongside down the main hatch and started both pumps together. We kept at work on the coal till one or two o'clock, and it being then high water we made an attempt to haul the vessel off; this was one or two o'clock of the night of January 8. We had a couple of cables to the Storm King, about one hundred and fifty fathoms, and with them tried to haul her off; found she was imbedded in the sand; it was impossible to start her. The Storm King hauled off again, and the lighter hauled alongside the Storm King to give her some of the coal on the lighter's deck. The lighter was then brought back alongside the schooner. We went to work immediately throwing coal overboard. We continued at work till about ten o'clock at night, so as to allow the suction pipe of the pump to suck the water. At 10 P. M. the wind from east-northeast had freshened to a violent storm.

"When it broke daylight, some of the men were on deck and some hanging to the weather rail, taking the seas as they broke over them on their hands and knees. It was impossible to do anything; the surf was so bad that the men on shore could n't get to us. Two men volunteered to get into the dory. They got ashore. We hauled up the surf-boat and dropped into it from the main boom, and rowed to the lighter. . . . . On Sunday, January 10, A. M., the Storm King towed us to Hyannis. We had been out ever since the 7th. The storm was the most severe I ever saw. As soon as I arrived at Hyannis I notified the master that I would have nothing further to do with the vessel. I did this because I did n't consider her of any value whatever. Her forward house was gone, her cabin washed out,

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and I supposed her port bilge was entirely stove in. I did not think I could save vessel or cargo at that time. During the gale our pumps and things listed to the leeward. This soft coal was very light, and great seas breaking over the deck would put the coal in motion, and it would go down in the lee waist. It would go overboard; the bulwarks were knocked out. I should think we threw overboard forty or fifty tons of the coal. Thirty or thirty-five tons, in my judgment, was taken aboard the lighter. From what was put on the lighter we coaled the Storm King during the first part of the storm. This was necessary. As a matter of judgment, fifteen or twenty tons were put on the Storm King. Perhaps ten tons were thrown over from the lighter. We had some ten or fifteen tons aboard the lighter when we reached Hyannis. I don't think I could give any estimate how much of the cargo was washed out of her, because the vessel was carried entirely under water, so that during the gale and shifting of the cargo it would be impossible for me to tell much about it. There was sand in the hold of the vessel, because we pumped sand up from the fore hatch through our pumps. The coal was mixed with sand. After I got to Hyannis Harbor, I reported to the captain, abandoned the cargo, and told him that I was through with the contract. . . . . When I got to Boston I notified the general manager of the Tow-Boat Company that I was done with the Theresa; that I did n't think there was sufficient vessel to save. After that he made a contract himself, under which I made a further attempt to save her. . . . . On February 3 we hauled her to Hyannis Harbor. We carried her in full of water. She went as far in as she could go, and remained there, on the bottom. I left her so and went home. I did not return to her till March 12. On that day she lay alongside the pier at Hyannis, nearly filled with water. She had coal in her then. I took it out; I took out about forty tons, I judged. After that I patched her bottom and carried her to New Bedford, delivering her there March 15, something more than two months after she was wrecked. I don't think it would have been possible to discharge the coal from the schooner at the place where she was ashore, unless by using the pontoons as we did. The expense per day of the boilers, lighters, pontoons, steam pumps, steam tugs, and men would have been rising $400

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per day. To discharge the cargo we should have to lift the vessel and take her somewhere. It would take three days to lift her, and I think it would have taken five days to lift her to take her somewhere and discharge the cargo, the best we could have done."

On cross-examination he testified: "I did n't see the vessel out of water at New Bedford, but there was an inspection made by divers. They found her keel gone and garboard seam next the keel all open. . . . . The coal thrown over January 7 was from the main hatch. During the 7th and 8th I judge forty or fifty tons were thrown over; that is merely my judgment and guess-work. At the same time we filled the lighter twice. We put on thirty to thirty-five tons; out of that we put fifteen or twenty tons aboard the Storm King. We then filled up the lighter again from the Theresa, and in going into Hyannis had to throw over part of the load to save her, I should think from eight to ten tons; about sixteen tons got to Hyannis on the lighter. I can't estimate how much coal washed out through the bulwarks; it would be impossible. This soft coal, being very fine, went through the pumps. What fell through the hatch was piled up on the leeward side; it was washed up out of the hatch, and caught up by the bulwark on the lee side. I judge some of it must have gone out through the places in the bulwark. There was no breaking in of the vessel below the deck; it was above the deck. The quantity lost in this way could n't be very little; I don't know whether more than two or three tons. I did not see any go overboard through these places in the bulwarks, for the simple reason that the vessel was entirely submerged. . . . .

"The whole quantity of coal taken out on the lighters and the Storm King was forty-five tons, about, when we left the vessel on the 10th. We shovelled overboard forty or fifty tons, to the best of my judgment. I don't know how much coal washed out of her, or how much remained in the vessel. I don't know whether any went out through the bottom; possibly the fine coal might have gone out in the seam. Nothing but fine coal. Getting her into Hyannis after the 23d involved no removal of coal. What coal there was we lifted up with the pontoons in the vessel, except what little was used by the steam pumps, —

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very little; they would not use over a ton a day for each pump if we drive them steady. We had been using that on the 8th, 9th, and 10th. We were out there January 30 and February 1 and 2. While taking the vessel into Hyannis, or on the 23d, I had not in mind at all how much coal remained on board the vessel. You could see, by looking down the main hatch, some coal there; the hole I dug with the steam pump was levelled up. I left her then. The next time I came there, March 12, she was alongside of the wharf. She was not discharged of coal before I got there the 12th; she was filled full of water. Between February 3 and March 12, I don't know whether any coal was taken out of her; somebody else was in charge. We had three steamboats there; whether they used any of it I can't tell. I estimate forty tons remaining in her, March 12, merely from the coal piled up on the wharf. There was no measurement. It was taken out of the vessel, March 12."

On re-direct examination to the question, "Now don't you believe that under the circumstances that that vessel lay in there, with a storm of two or three days, her hatches open, water in amongst her cargo, and the waves breaking over her, that that cargo was extensively washed out?" he replied, "Well, the cargo was in motion, no doubt"; and to the further question, "Don't you believe that her cargo of light, soft coal, in the condition that that was, with her hatches open, would wash out under those circumstances?" he replied, "I don't think I am hardly competent to answer that, because in my experience I don't ever have chances to take observations. There is no question that some of the coal came out of the hatch. In the subsequent storms after January 10, there would not be the same chances for the cargo to wash out; not so much, because this was a tremendous gale of wind. We never have such seas as on that night. She never righted a foot while we were there; she lay at an angle of about forty-five degrees. On the 23d the water was running into her hatch, and had been ever since the 10th. It depends on the motion what effect that would have on the soft coal. I could n't tell how far below deck the coal was as I looked down the hatch. She still had some list to port as we took her into Hyannis. I could see into the hold and see coal there, but could not tell how far below deck it was. It was levelled off;

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the sea did that; it carried the same list the vessel did. I could not judge, looking through the hatch, what portion of the cargo remained after arriving at Hyannis."

The defendant asked the judge to rule that the plaintiffs upon the evidence were not justified in abandoning the freight insured, and could not recover as for a total loss of the freight under the policy. The judge refused so to rule, ordered a verdict for the plaintiffs as for a total loss, and reported the case for the determination of this court. If the plaintiffs were entitled to recover as for a total loss, the verdict was to stand; if the plaintiffs were entitled to a partial loss only, a new trial was to be ordered.

W. E. Russell, (*C. T. Russell* with him,) for the plaintiffs, contended that there was a total loss of freight; 1. by the actual or constructive loss of the vessel, or of her voyage, within the terms of the policy; 2. by the actual or constructive total loss of cargo; or 3. either by loss of the voyage, the expense of forwarding cargo, the delay, impossibility, or uselessness of so doing, or any facts showing that the assured had actually lost more than one half of the freight.

F. Dodge, for the defendant.

HOLMES, J. This is an action upon a policy of insurance on freight on board or not on board schooner Theresa for one year. The freight is "valued at twenty-five hundred dollars, unless a larger amount at risk, then at actual freight"; and the policy provides that time risks on freight shall apply "to each cargo (or voyage, if in ballast and not chartered) successively, or to each charter successively in case vessel be chartered." *Thwing* v. *Washington Ins. Co.* 10 Gray, 443, 453. The only question is, whether the court erred in refusing to rule that upon the evidence the plaintiffs could not recover for a total loss.

The defendant's main reliance is upon the following clause in the policy: "And it is agreed, that the insured shall not have the right to claim for total loss on account of the estimated amount of repairs exceeding the valuation of the vessel, nor under any circumstances to abandon, provided the vessel remain *in specie*, unless the amount which the insurers would be liable to pay (exclusive of all general average charges, and charges for getting off or raising and bringing into port a vessel stranded or submerged, and of all repairs consequent upon decay) under an

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adjustment, as of partial loss, after making all the usual deductions, including the proportion or whole of cost of remetalling, docking, and calking, as provided for in this policy, shall exceed half the value of said vessel, as declared in this policy; and the highest valuation under which the vessel is insured, in any policy, shall be the basis for ascertaining a technical total loss of freight under this policy." The defendant contends that all parts of this clause apply to insurance on freight, and limit the right to abandon it to the case there expressed.

We have not found it necessary to consider whether this clause in any way limits the right to claim for a total loss of freight, except to provide that when the claim is based upon a constructive total loss and abandonment of the vessel as the foundation, the value of the vessel is to be taken at the highest valuation in any policy, and then to leave the question to be determined as in *Ellicott* v. *Alliance Ins. Co.* 14 Gray, 318, 320, so far as the defendant is concerned. For even if we should follow the plaintiff's argument to that extent, still it would be impossible to make out a total loss of freight on this footing consistently with the statement in *Thwing* v. *Washington Ins. Co.* 10 Gray, 443, 457, 458, — that where the cargo can be forwarded at a cost of less than half the stipulated freight, there is no total loss, — if in a case like the present the freight is to be taken at the valuation in the policy for the purpose of determining that question. *Thwing* v. *Washington Ins. Co.* at p. 461. *Whitney* v. *New York Firemen's Ins. Co.* 18 Johns. 208, 210. *Allen* v. *Commercial Ins. Co.* 1 Gray, 154, 157.

But we think it too plain for argument, that, whatever its scope, the clause does not extend beyond the case where the claim for a total loss of freight is based upon the loss of the ship. It has no application where the claim is based upon the loss of the cargo. If it did apply to a claim on the latter ground, it would do so simply in the sense of excluding it altogether. But nothing of that sort is intended, as the next sentence regulates a claim for freight based upon loss of perishable goods, and an earlier one deals with loss of freight on ice or lime caused by destruction of those articles.

The plaintiff claims on the ground of the loss of cargo *in specie* by perils of the seas, as well as on that of the loss of the ship.

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The whole cargo, which consisted of two hundred and seventy-four tons of coal, was not lost. The whole actual freight was only five hundred and twenty dollars and sixty cents, or much less than half the valuation in the policy. If, therefore, we are to follow the rule which has been applied in this Commonwealth for the purpose of determining whether there is a constructive total loss of a ship under a valued policy, there has been no constructive total loss of freight, and there could not be so long as a single ton remained which could be forwarded for less than about seven hundred and thirty-two dollars, or half the valued freight less the actual freight supposed to be lost. We have no disposition to depart from the rule so far as it is settled, but in the existing state of the decisions elsewhere it should not be extended. *Bradlie* v. *Maryland Ins. Co.* 12 Pet. 378, 398, 399. *Irving* v. *Manning*, 1 H. L. Cas. 287, 306. *Stewart* v. *Greenock Ins. Co.* 6 Ct. of Sess. Cas. (2d series) 359. Phillips, Ins. § 1539. It is to be noted that in *Allen* v. *Commercial Ins. Co.* 1 Gray, 154, 157, while the rule is adhered to, some stress is laid upon the fact that it was embodied in the words of the policy before the court, as is usual in Boston. Phillips, Ins. § 1539, n. It is to be noticed further, that the reasons offered in *Deblois* v. *Ocean Ins. Co.* 16 Pick. 303, 312, other than that abandonments for technical total losses are not to be favored, have no application here. The actual value of the vessel will fluctuate, according to the time when and place where the loss occurs. Furthermore, it is a matter of estimate, on which opinions may differ widely. It may well be said that such estimates are excluded by the agreement of the parties, and that, as the only way of ascertaining whether the loss is more than half is by comparing the cost of repairs with some valuation, the valuation in the policy must be accepted.

But in the case at bar there is no element of fluctuation or of valuation. If the freight of a whole homogeneous cargo is conclusively presumed to be worth the valuation in the policy, there seems to be no reason why the freight of one half of it should not be presumed to be worth one half of that valuation. A loss of one half of the cargo *in specie* by perils of the seas entails a loss of one half of the actual freight, and the policy establishes that that freight is worth twenty-five hundred dollars. In any case

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of loss of freight by loss of cargo, the question whether the loss is total can be determined by the simple rule of three. There being no question of fraud, or suggestion that the ship did not take a full cargo, or at least all that she could get, (*Coolidge* v. *Gloucester Ins. Co.* 15 Mass. 341, 344,) we are of opinion that a loss of more than half the cargo *in specie* by the perils insured against authorized the plaintiffs to abandon the freight, and claim for a total loss. See *Denoon* v. *Home & Colonial Ass. Co.* L. R. 7 C. P. 341, 351. *Clark* v. *United Ins. Co.* 7 Mass. 365, 373. *Fay* v. *Alliance Ins. Co.* 16 Gray, 455, 459.

We are also of opinion that there was evidence from which the jury would have been warranted in finding that there was such a loss of more than half the cargo. We do not say that they might not have found otherwise, but as the defendant did not wish to go to the jury after the court had declined to take the case from them by a ruling in its favor, we have nothing to do with that possibility.

The total amount of coal was two hundred and seventy-four tons, one half of which is one hundred and thirty-seven. The witness Baker estimated that on March 12 he took forty tons out of the vessel at Hyannis, the port to which she was taken when raised. It is true that he says he does not know whether any coal was taken out between February 3, the day of arrival, and March 12, when he got there. But plainly he means merely that he does not know by the direct evidence of his senses; for he also says, "She was not discharged of coal before I got there, the 12th; she was filled full of water." So that it is a fair inference from what he saw, that no coal was taken out before. Baker further estimates that they threw over forty or fifty tons in a vain effort to save the vessel, which was abandoned, and that there were put on board the lighter thirty or thirty-five tons; in another place he says forty-five, of which ten or fifteen tons reached Hyannis, and the rest was used or thrown overboard. The coal was very light, and the great seas washed it out of the vessel, but he could not say how much. Giving the defendant the benefit of all the above amounts, (see *Forbes* v. *Manufacturers' Ins. Co.* 1 Gray, 371, and *Griswold* v. *Union Ins. Co.* 3 Blatchf. C. C. 231,) and of the highest figures stated, they are only one hundred and thirty-five tons, or less than half, unless the "very

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little" used by the steam pumps is to be added, and exceeded two tons, and the fair inference is that the rest was lost by perils of the sea. The only reason for doubt is in the vagueness of Baker's estimates. But they seem to have been the best evidence to be had under the circumstances, and the jury would have been warranted in accepting them, and would have accepted them perhaps the more readily in view of the fact that the defendant paid the owners of the cargo for a total loss. If then the jury had inferred that the coal not accounted for by Baker was lost by the perils insured against, and that it amounted to more than half the cargo, the verdict could not have been set aside as not warranted by the evidence. *Verdict to stand.*

WARREN S. DAME & others *vs.* DANIEL E. KEMPSTER & others.

Suffolk. March 7, 1888. — March 12, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Partnership — Agreement — Net Profits.

An agreement between three persons to carry on a manufacturing business under a firm name, recited that two of them were to assign to the third an interest in a patent; that the third was to buy materials and sell the product, control the finances, and furnish the capital; that if he failed to furnish the capital, the others might assume the management and control of the business; that each was to receive compensation for his services; that the "net profits" after "deducting expenses," including such compensation, should be divided equally between them; and that neither should sell or assign his interest in the business without the written consent of the others. *Held,* that the three persons were partners.

CONTRACT against Daniel E. Kempster, William L. Faxon, and Stiles Frost, as copartners, doing business under the firm name of the Kempster Roller Skate Company, to recover for certain boxwood rolls sold and delivered to them.

At the trial in the Superior Court, before *Pitman*, J., the plaintiffs introduced evidence tending to show that, although all bills and statements for the rolls had been rendered by them in the name of the defendant Faxon as purchaser, they in fact

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sold the rolls to the Kempster Roller Skate Company; and the question upon whose credit the goods were furnished was submitted to the jury under instructions not objected to.

On the issue whether the defendants were copartners, the plaintiffs offered in evidence the following agreement, signed by the defendants:

"Memorandum of agreement made this sixteenth day of March, 1885, by and between Daniel E. Kempster and Stiles Frost, both of Boston, Mass., and William L. Faxon, of Quincy, Mass. Whereas, said Kempster has invented an improvement in roller skates, for which an application for letters patent of the United States is now pending. And whereas, said Kempster has heretofore sold and assigned one half of his interest in said invention, and any letters patent which may be granted therefor, to said Frost. And whereas, said Faxon is desirous of obtaining an interest in said invention and letters patent, and of joining with said Kempster and Frost in the business of manufacturing and selling said skates, — now, therefore, in consideration of the mutual covenants and agreements of the said parties herein contained, the said parties mutually covenant and agree with each other as follows, viz.:

"*First.* The said Kempster and Frost agree to assign to said Faxon an undivided one-third interest in said invention and letters patent, for which said Faxon agrees to pay the sum of two thousand dollars, of which five hundred dollars is to be paid in cash on or before March 25, 1885, and the remaining fifteen hundred dollars on the issuing of letters patent for said invention, and the delivery to him of a written assignment of said one-third interest therein.

"*Second.* It is agreed, as a further consideration for the assignment aforesaid, that whatever capital may be necessary to carry on the business of manufacturing and selling roller skates, under said letters patent as hereinafter provided, shall be furnished by said Faxon, and that he shall be allowed interest thereon at the rate of six per cent per annum. Should either of the other parties at any time advance any portion of the capital employed in said business, he shall be allowed interest thereon at the same rate. It is understood and agreed that all capital furnished as aforesaid shall be at the risk of the business, and

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that none of the parties hereto shall be personally liable to make good any deficiency therein, nor shall their interest in said letters patent and invention be liable therefor.

"*Third.* The business of manufacturing and selling roller skates under said letters patent shall be carried on by said parties under the name of the Kempster Roller Skate Company of Boston.

"*Fourth.* It is agreed that said Faxon shall have general charge of the financial department of said business, including the purchase of materials and sales of skates, and that for such services he shall receive a salary of two thousand dollars per annum. It is, however, expressly understood and agreed that he shall give no notes, nor borrow money on account of said business, in the names of the other parties hereto, or on their credit.

"*Fifth.* It is agreed that said Kempster shall have the entire superintendence and management of the manufacturing department of said business, including the employment and direction of help, and that he shall receive for such services the sum of fifteen hundred and sixty-five dollars per annum, payable weekly.

"*Sixth.* It is agreed that said Frost shall receive for such special services as he may render a fair compensation, to be determined by mutual agreement.

"*Seventh.* It is agreed that the net profits resulting from the manufacture and sale of said skates, after deducting expenses, including the special compensation of the parties as above provided, shall be divided equally among the parties hereto.

"*Eighth.* It is agreed that accurate accounts of the said business shall be kept, which shall always be open to the inspection of all parties hereto, and that once in every six months, commencing November 1, 1885, a statement of such accounts and of the profits made during the preceding six months shall be furnished to each party, and the share of profit due to each party paid to him within thirty days thereafter.

"*Ninth.* It is agreed that neither of the parties shall sell or assign his interest in said letters patent and invention, or in the business of manufacturing and selling said skates, or license any other party to manufacture skates under said letters patent, without the written consent of the other parties hereto.

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"*Tenth.* It is agreed that, in case the said Faxon shall fail to furnish the capital necessary for the successful development of said business, the other parties hereto may assume the management and control of the said business in his place, in which case they shall be subject to the same obligations and entitled to the same privileges as are herein specified with reference to said Faxon."

The judge ruled that, under this agreement, the defendants Kempster and Frost were liable for the contracts of Faxon within the scope of the business for which they were associated.

It further appeared in evidence, that the defendants did business under and according to the above agreement, and the defendant Kempster requested the judge to rule that, as he was employed at a stated and agreed price for his services in conducting the business, payable at given periods, and was not liable for any losses of the business, he was not, either as to his employers or third persons, a partner, and that the plaintiffs could not recover against him in this action, although he was entitled to a specific portion of the profits. The judge declined so to rule, and the jury returned a verdict for the plaintiffs. The defendants Kempster and Frost alleged exceptions.

A. K. P. Joy & F. Joy, for Kempster and Frost.

M. Holbrook, for the plaintiffs, was not called upon.

MORTON, C. J. The Superior Court correctly held that the agreement between the defendants made them partners. By it they were to carry on the business of manufacturing and selling roller skates, under the name of the Kempster Roller Skate Company. Faxon was to furnish the capital, and to have the general charge of the financial department of the business, and of buying materials and selling skates; each party was to receive a certain compensation; and then it is provided that "the net profits resulting from the manufacture and sale of said skates, after deducting expenses, including the special compensation of the parties as above provided, shall be divided equally among the parties hereto." It is further provided, that, if Faxon should fail to furnish the necessary capital, the other parties may assume the management and control of the business in his place. It is impossible to construe this agreement so as to hold that

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Faxon was the only principal in the business, and that the other defendants were his agents.

On the contrary, it is clear that the materials purchased and the skates manufactured were the property of the three defendants, and that they shared in the profits of the business, and to some extent at least in the losses. Each defendant is entitled to a share of the profits as profits, and he has a lien upon them and upon the stock as against the private creditors of either of the other defendants. In other words, there is in the three defendants a community of interest in the property or stock engaged in the business, and a community of interest in the profits. This, according to all the authorities, made them partners.

Exceptions overruled.

JAMES COULTER *vs.* WARREN HAYNES.

Middlesex. March 16, 1888. — March 19, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Chose in Action — Assignment — Action — Assignee — Assent — Indorsement for Costs.

If the assignor of a chose in action brings an action thereon while the assignment is in force, the appearance of the assignee in court, and his statement that "he did not desire through his assignment to prevent the recovery in this action," ratifies the bringing of the action, and will authorize the assignor to prosecute it; and the assignee need not indorse the writ.

An indorser for costs can be secured only by application to the court, under the Pub. Sts. c. 167, § 30.

CONTRACT to recover a balance due for wages. Trial in the Superior Court, before *Knowlton*, J., who allowed a bill of exceptions, in substance as follows.

On October 15, 1885, the plaintiff assigned in writing all his wages then due, or that might become due, from the defendant, to John K. Harriman, until October 1, 1886, to secure a grocery bill. When the action was brought, the plaintiff was still indebted to Harriman, and so remained at the time of the trial. Harriman testified that he never authorized the plaintiff, or any

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one, to bring the action, and had not consented to its maintenance; that he had known for a long time that the action had been brought, and had seen the plaintiff frequently, and had never objected to it; and that if there was anything due from the defendant, he did not desire through his assignment to prevent the recovery of it in this action.

The defendant asked the judge to rule: "1. That a suit brought in the name of an assignor of wages, without the consent of the assignee, and not sanctioned by said assignee before trial, cannot be maintained by the plaintiff, the assignor still being in debt to the assignee. 2. That said action could not be maintained and carried on unless the assignee indorsed the writ, and became liable for taxable costs of suit."

The judge refused so to rule, and the jury returned a verdict for the plaintiff. The defendant alleged exceptions.

J. W. Reed, for the defendant.

J. T. Joslin, for the plaintiff.

BY THE COURT. The suit was properly brought in the name of the plaintiff, although he had assigned his claim to Harriman. The assignment is not a defence to the action. If any authority from the assignee was necessary to enable the plaintiff to maintain the action, the appearance of the assignee in court, and his statement that "he did not desire through his assignment to prevent the recovery" in this action, ratified the bringing of the suit, and was a sufficient authority to the plaintiff to prosecute the action. *Moore* v. *Spiegel*, 143 Mass. 413.

The assignee was not required to indorse the writ; but if it was a case where an indorser for costs ought to be required, the defendant's remedy was by an application to the Superior Court under § 30 of c. 167 of the Public Statutes.

Exceptions overruled.

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GYLES MERRILL *vs.* BYRON L. PEASLEE & others.

Essex. November 5, 1887. — March 30, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Husband and Wife — Promissory Note — Consideration — Public Policy.

A husband guilty of extreme cruelty to his wife, who thereupon left him and consulted counsel as to obtaining a divorce and alimony, gave a note to a trustee for her benefit, in consideration that she would drop the divorce proceedings and "return to him and live with him as his wife"; and the wife returned to him and lived with him as his wife until his death. *Held*, that the consideration for the note was illegal. — C. ALLEN, HOLMES, & KNOWLTON, JJ., dissenting.

CONTRACT upon a promissory note for $5,000, dated October 29, 1875, payable to the order of the plaintiff on demand, and signed by Hiram Peaslee, the defendants' testator. The answer set up want of consideration. Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions, in substance as follows.

The plaintiff introduced evidence tending to show that Hiram Peaslee was married to Abby D. Rowe on January 20, 1873, and that they lived together as husband and wife until October 13, 1875; that at the wedding of his daughter, which occurred at his house on that date, and in the presence of some of the guests, Hiram Peaslee was guilty of extreme cruelty and abusive treatment towards his wife, entitling her to a divorce; that she then left him, and consulted counsel with a view to obtaining a divorce and alimony, he being worth about seventy-five thousand dollars at the time; that Hiram Peaslee agreed with her, that, if she would not proceed against him for a divorce or alimony, and would return to him and live with him as his wife, he would secure to her benefit the sum of five thousand dollars; and that in pursuance of the agreement Hiram Peaslee signed the note, and delivered it to the plaintiff, from whom at the same time he took the following agreement under seal, signed by "Gyles Merrill, trustee":

"Be it known that Hiram Peaslee of Haverhill, in the county of Essex and Commonwealth of Massachusetts, on this twenty-

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ninth day of October, A.D. 1875, has made and delivered to me, Gyles Merrill of said Haverhill, for value received, his promissory note for five thousand dollars, payable to me or order on demand, without interest, subscribed by him in the presence of a witness, and so made and delivered the same to me in trust, for the following purposes, viz.: I as such trustee am to retain said note in my keeping and control until the decease of said Peaslee, and then as soon as may be after such decease to collect the amount of the same in money from the estate of said Peaslee, and to pay such amount over to Abby D. Peaslee, wife of said Hiram Peaslee, provided she shall then be the widow of said Hiram, and shall have lived with him as his wife, and not have separated herself from him until his decease, unless for good cause hereafter arising. But if said Abby D. Peaslee shall have so separated herself from said Hiram, and at his decease shall not be his widow, then I, said trustee, am to deliver said note to the legal representatives of the estate of said Hiram, and to receive my reasonable charges for services in the premises from said estate."

The plaintiff introduced further evidence tending to show that the note was given by Hiram Peaslee in consideration that his wife would return to him, and live with him as his wife, and in consideration that she would not institute proceedings for a divorce and alimony, and that there was no other consideration for the note, excepting the acceptance of the trust by the plaintiff and the above agreement on his part; and that the wife, in consideration of the making and delivery of the note, thereupon returned to and lived with him as his wife until his death, and thereby relinquished her right to institute proceedings for a divorce and alimony, and did not institute such proceedings.

The judge ruled that there was no evidence of a legal consideration for the note, and that as matter of law the action could not be maintained, and ordered a verdict for the defendants. The plaintiff alleged exceptions.

The case was argued at the bar in November, 1887, and afterwards was submitted on briefs to all the judges.

H. Carter & B. B. Jones, for the plaintiff.

W. H. Moody, for the defendants.

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W. ALLEN, J. The note was given to carry out a contract between husband and wife, by which, in consideration that she should live with him as his wife during their joint lives, he was to cause to be paid to her five thousand dollars after his decease, if she survived. The consideration of the note was the agreement, or the performance of the agreement, of the wife to live in marital relations with her husband. It was not to perform some service for him which could be hired, as to keep his house, or to nurse him in sickness, but to give him the fellowship and communion of a wife. This is not a service which the wife can sell or the husband buy. Perhaps a husband can hire his wife to do anything for him which a servant can be hired to do, or can buy of her anything that is the subject of barter; but a servant cannot be hired to fulfil the marital relation, and the fellowship of the wife is not an article of trade between husband and wife. Like parental authority and filial obedience, conjugal *consortium* is without the range of pecuniary considerations. The law fixes and regulates it on public considerations, and will not allow the parties to discard and resume it for money.

It is the same when the misconduct of one party has given to the other the option to withdraw conjugal fellowship. It is not a mere personal right affecting only the parties to the marriage, but a right which is an incident of the status of marriage, and which affects children, the family, and society, and which must be exercised upon considerations arising from the nature of the right. It is given to the injured party to be used in the interests of justice and of society. It is as much against public policy to restore interrupted conjugal relations for money, as it is to continue them without interruption for the same consideration. The right of condonation is not exercised for the sake of justice to the injured party, or with regard to the rights of others or the interests of the public, when it is sold for money, and the law cannot recognize such a consideration for it; it implies forgiveness founded on the supposed penitence of the wrongdoer and the hope that he will not again offend. The resumption of marital intercourse after a justifiable separation without such forgiveness, and only for money, shows connivance rather than condonation. See *Copeland* v. *Boaz*, 9 Baxter, 223; *Van Order* v. *Van Order*, 8 Hun, 315; *Roberts* v. *Frisby*, 38 Tex. 219; *Miller*

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v. *Miller*, (Iowa,) 35 N. W. Rep. 464; *Adams* v. *Adams*, 91 N. Y. 381; *Garth* v. *Earnshaw*, 3 Y. & C. 584; *Gipps* v. *Hume*, 2 Johns. & Hem. 517; *Brown* v. *Brine*, 1 Ex. D. 5.

In the present case the wife had left her husband, and had a good cause of divorce from him on account of extreme cruelty. But the agreement did not look to a provision for the separate support of the wife, nor to a bar against proceedings by her for a divorce, except as that was involved in the resumption by her of marital relations. Had the consideration of the note been an agreement not to prosecute proceedings for a divorce, a different question would have been presented, upon which we express no opinion. See *Newsome* v. *Newsome*, L. R. 2 P. & D. 306. When the wife, who was living separate from her husband for justifiable cause, voluntarily returned to him, the law conclusively presumed that she returned because she had condoned the offence, and not because she was paid to live with him; and it will not enforce or recognize as valid a promise of the husband to pay money to the wife to induce her to return to him, or to condone the offence. In the opinion of a majority of the court the entry must be, *Exceptions overruled.*

HOLMES, J. We must assume, and the majority of the court do assume, that a consideration furnished by a married woman who is a *cestui que trust* will sustain a promise by her husband to her trustee. Whatever might be thought upon this point as a new question, it has been settled, not without discussion, and we are bound by the decisions. *Butler* v. *Ives*, 139 Mass. 202. See *Nichols* v. *Nichols*, 136 Mass. 256.

In the case at bar the evidence tended to show that the defendant's testator had been guilty of extreme cruelty to his wife, entitling her to a divorce, and that she had separated from him, and had consulted counsel with a view to obtaining a divorce and alimony. The consideration for the note in suit was, that "she would not proceed against him for a divorce or alimony, and would return to him and live with him as his wife." This consideration, however construed, was fully furnished. She did not proceed against him, and she did return and did live with him as his wife until his death.

I do not understand it to be denied that this conduct on the

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wife's part was such a change of position, or detriment in the legal sense of that word, as to be a sufficient consideration for a promise, if not an illegal one. We must take it that the wife had a right to refuse to return to cohabitation, and it seems to follow that, apart from illegality, the return itself was sufficient consideration for the note. *Burkholder's appeal*, 105 Penn. St. 31, 37. The case is not like those where the wife was only doing what she was legally bound to do. This was the ground of decision in *Miller* v. *Miller*, (Iowa, Dec. 13, 1887,) 35 N. W. Rep. 464, and, so far as appears, was the fact in *Copeland* v. *Boaz*, 9 Baxter, 223; *Roberts* v. *Frisby*, 38 Tex. 219. The last two cases seem to go in part also upon the ground that a contract by a husband upon a consideration moving from the wife is void, notwithstanding the intervention of a trustee, which cannot be taken here, in view of the cases first cited.

At all events, the giving up or refraining from proceedings for a divorce and alimony, which the wife is entitled to maintain, is both a sufficient and a legal consideration. *Wilson* v. *Wilson*, 1 H. L. Cas. 538, 574; *S. C.* 14 Sim. 405; 5 H. L. Cas. 40. *Hart* v. *Hart*, 18 Ch. D. 670, 685. *Sterling* v. *Sterling*, 12 Ga. 201, 204. So that I understand the precise reason on which the decision of the majority goes to be that coupling the wife's return to cohabitation with the legal consideration of giving up her divorce suit made the contract illegal.

I find no decision or dictum in favor of this proposition. On the other hand, the Court of Errors and Appeals of New York has unanimously sustained the validity of a note given by a husband to a trustee for his wife upon substantially the same consideration as in the case at bar, and has declared itself unable to see anything against public policy in the transaction. It seems probable that the Supreme Court of Pennsylvania would decide in the same way, and it is hardly open to doubt that the same view would be taken in England. *Adams* v. *Adams*, 91 N. Y. 381. *Burkholder's appeal*, 105 Penn. St. 31, 37. *Newsome* v. *Newsome*, L. R. 2 P. & D. 306. *Jodrell* v. *Jodrell*, 9 Beav. 45, 56, 59, and cases *supra*. *Symons* v. *Burton*, Monro, Acta Cancellariæ, 266.

It seems to me that reason as well as authority is opposed to the decision. The actual return to cohabitation was perfectly

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lawful, whatever the motive which induced it. I cannot think that it is unlawful to make a lawful act, which the wife may do or not do as she chooses, the consideration of a promise, merely because, by reaction, the making of the promise tends to mingle a worldly motive with whatever other motives the wife may have for renewing cohabitation. No one doubts that marriage is a sufficient consideration for a promise to pay money. Pub. Sts. c. 78, § 1, cl. 3. I do not quite understand why it should be more illegal to make such a promise for the resumption than for the assumption of conjugal relations.

I agree too to what is said in *Adams* v. *Adams*, *ubi supra*. The arrangements "tended to restore peace and harmony between husband and wife, and renew their conjugal relations. Agreements to separate have been regarded as against public policy, but it would be strangely inconsistent if the same policy should condemn agreements to restore marital relations after a temporary separation had taken place. While the law favors the settlement of controversies between all other persons, it would be a curious policy which should forbid husband and wife to compromise their differences, or preclude either from forgiving a wrong committed by the other."

I am authorized to say that Mr. Justice Charles Allen and Mr. Justice Knowlton concur in this opinion.

LAWRENCE RILEY *vs.* WILLIAM E. HALE.

Middlesex. March 26, 1888. — April 2, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Judgment — Review — Absence — Laches.

A judgment by default in a civil action against a defendant, on whom personal service was made and by whom an appearance was entered, is not rendered in his "absence," within the Pub. Sts. c. 187, § 22, and a petition for a review, filed more than a year after it has been rendered, but within a year after he had notice thereof, is too late.

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PETITION, filed August 5, 1886, for a review of a judgment rendered upon the petitioner's default, by the Superior Court, on June 30, 1883, alleging that it was filed within one year after he first had notice of the judgment.

Hearing before *W. Allen*, J., who found that the petitioner had shown such probable ground of defence to the original action as might entitle him to a writ of review, but that he had not used such diligence as to entitle him to it; that the writ in that action was duly served on him, and he entered his personal appearance therein; that the action was continued, and he did nothing further about it, under the mistaken belief that it was not necessary to do anything further; and that nothing was done by the plaintiff in that action, or by his attorney, to induce such a belief.

The judge refused, as matter of law, to grant the petition; and the petitioner alleged exceptions.

H. N. Allin & W. Howland, for the petitioner, cited *Hutchinson* v. *Gurley*, 8 Allen, 23.

W. F. Slocum, for the respondent.

BY THE COURT. This is a petition filed on August 5, 1886, to review a judgment of the Superior Court rendered on June 30, 1883. In the original suit, personal service was made upon the petitioner, and he entered his personal appearance therein. The judgment was not rendered in his absence, within the meaning of § 22 of c. 187 of the Public Statutes, and therefore the presiding justice who heard this petition for review properly ruled that it could not be maintained. *Matthewson* v. *Moulton*, 135 Mass. 122. *Smith* v. *Brown*, 136 Mass. 416.

Exceptions overruled.

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SUSANNAH KENNISON *vs.* INHABITANTS OF BEVERLY.

Essex. November 2, 1887. — April 6, 1888.

Present: MORTON, C. J., FIELD, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Watercourse — Surface Water — Town — Way.

A town is not liable if surface water, collected in catch-basins or gutters constructed by its agents or by its highway surveyors beneath the surface of a highway, percolates thence through the soil into the cellar of an adjoining owner, to his injury.

TORT for damages caused by surface water, accumulated in a catch-basin in Bartlett Street in Beverly, percolating into the cellar of the plaintiff. Trial in the Superior Court, before *Bacon*, J., who allowed a bill of exceptions in substance as follows.

The plaintiff testified that water ran into her cellar from the drain in front of her house a great deal every year after it was moved, fifteen years before, until since this action was commenced; that a large amount of water draining from a street called Cabot Street was collected in drains by the road-side, and conducted into other drains by the side of Bartlett Street, where it mingled with all the surface water which drained from Bartlett Street, and flowed along the side of that street, and in part through a culvert or drain constructed across it, until it came into a pit or catch-basin on the side of Bartlett Street directly opposite her house, and from eight to ten feet therefrom, whence it flowed through the soil and the wall into her cellar, causing damage to her property at all times when the water flowed through the culvert in consequence of storms, showers, or the melting of snow.

Henry A. Foster, in addition to the above facts, testified that a great deal of water from another street, called Lovett Street, also flowed into the drain by the side of Bartlett Street, and into the catch-basin; that the plaintiff's house was moved to its present location by the defendant fifteen years before; that at that time some alteration in the drains or gutters was made, and the catch-basin, which was an extension of the culvert, and was about four

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feet deep and two and a half feet wide, was constructed about ten feet from the plaintiff's house, having its sides made of loose rocks uncemented; that a small pipe under ground was its only outlet, which, on examination just before the action was brought, was found to be completely choked up with sticks and leaves; and that some repairs were made on the drain two or three years before the action was begun.

Daniel Foster testified that there was a drain on one side of Cabot Street which took the water for a distance of six hundred feet from the corner of Bartlett Street into the drain on that street; that the drain on Bartlett Street took the drainage from that street a distance of two hundred or two hundred and fifty feet further, into the catch-basin; and that these drains and streets had been there for more than forty years.

The chairman of the board of selectmen of the defendant town at the time the plaintiff's house was moved, testified that Bartlett Street, Cabot Street, and Lovett Street were public highways, and that the gutters, culvert, and catch-basin were under the charge of the highway surveyors.

The judge ruled that the action could not be maintained, and ordered a verdict for the defendant; and the plaintiff alleged exceptions.

W. H. Gove & S. A. Fuller, for the plaintiff.

H. P. Moulton, for the defendant.

FIELD, J. The plaintiff complains that her land is injured by surface water, which is collected in drains or gutters by the sides of streets, and is thereby conducted into a pit, or catch-basin, on the side of Bartlett Street, directly opposite to her house, and from eight to ten feet therefrom, whence the water passes "through the soil and the wall into her cellar." There was evidence that this catch-basin was constructed with "its sides made of loose rocks uncemented," and that a "small pipe under ground was its only outlet," and that this was "completely choked up with sticks and leaves." The streets were public ways. The evidence does not show by whom the drains or gutters and the catch-basin were constructed, but we think that there was evidence that they were maintained by the town as a part of the system of highways which it was bound to keep in repair. The drains and catch-basin were within the limits of

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the highways. We are of opinion that the principles declared in *Flagg* v. *Worcester*, 13 Gray, 601, *Barry* v. *Lowell*, 8 Allen, 127, *Franklin* v. *Fisk*, 13 Allen, 211, and *Turner* v. *Dartmouth*, 13 Allen, 291, govern this case. See *Emery* v. *Lowell*, 104 Mass. 13, 16; *Merrifield* v. *Worcester*, 110 Mass. 216, 220.

If a town by its agents, or if the highway surveyors of a town, in constructing or repairing highways, cause the surface water to flow upon the land of an adjoining proprietor, there is no remedy by action. The owner of the adjoining land can protect himself by such barriers as he may choose to build, and in some cases he has a remedy under the Pub. Sts. c. 52, § 12 or § 15.

We can find no distinction in respect to legal liability between an injury to land from surface water collected in gutters and catch-basins which are below the surface of the adjoining land, and from which the water percolates through the soil, and an injury from surface water which, overflowing the gutters and catch-basins, runs over the adjoining land, or which is turned directly upon it. *Exceptions overruled.*

ROBERT BISHOP *vs.* ELISHA L. PALMER & others.

Suffolk. November 10, 11, 1887. — April 6, 1888.

Present: MORTON, C. J., FIELD, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Contract — Consideration — Covenant — Restraint of Trade.

A purchaser promised to pay in instalments for a business plant and property, in consideration of its sale and delivery, and the performance of three particular covenants and agreements by the seller, the first of which was a general agreement, without any limitation of space, that for and during the period of five years he would not either directly or indirectly continue in, carry on, or engage in that business or any business of which that might form any part. *Held*, that the covenant was void as being in restraint of trade, and that, not being severable from the rest of the consideration, no action would lie on the promise for instalments of the price.

CONTRACT. Writ dated November 1, 1886. The first count of the declaration alleged that the defendants owed the plaintiff

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$2,500 for breach of a written agreement signed by the parties and annexed thereto, the material parts of which were as follows:

"This agreement, made this sixteenth day of March, A. D. 1886, by and between Robert Bishop, of Boston in the Commonwealth of Massachusetts, party of the first part, and Elisha L. Palmer, Frank L. Palmer, Edward A. Palmer, and George S. Palmer, copartners together, doing business under the firm name and style of Palmer Brothers, at Montville in the State of Connecticut, parties of the second part; and the Massasoit Manufacturing Company, a corporation doing business at Fall River in the Commonwealth of Massachusetts, party of the third part, witnesseth:

"That whereas said party of the first part is engaged in the business of manufacturing and selling bedquilts and comfortables, and is also engaged in the business of buying, selling, and dealing generally in cotton waste; and whereas he is desirous of selling out his business as a manufacturer of bedquilts and comfortables, together with all his plant, machinery, and stocks, manufactured and unmanufactured, now on hand, and of wholly giving up and going out of said business for the next five years, and is also desirous of selling that part of his cotton waste business which is done or transacted in whole or in part in the city of Fall River, in said Commonwealth, and with any and all of the mills doing business in said city:

"Now therefore, in consideration of the premises, and of the sum of five thousand dollars ($5,000) to be paid by the parties of the second and third parts in the manner and at the times hereinafter specified, the party of the first part hereby sells, assigns, transfers, and delivers unto the parties of the second part his entire business plant and enterprise as a manufacturer of and dealer in bedquilts and comfortables, together with the good will of said business, and all and singular, the machinery, implements, and utensils used by him in said business, and constituting said manufacturer's plant. . . . .

"And for the consideration aforesaid, said party of the first part hereby sells, assigns, transfers, and conveys to the party of the third part all that portion of his waste business which is transacted or done in the city of Fall River, in the Common-

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wealth of Massachusetts, with any and all corporations doing business in said city; and he hereby assigns and transfers to said party of the third part all his existing contracts, whether verbal or written, with any of such corporations, or with firms or persons, and all rights thereunder, including rights of renewal; and also the good will of his said business and trade with the corporations in said city of Fall River. This clause does not have reference to buying and selling from individuals. It being the intention of said party of the first part absolutely and completely to sell and transfer to said party of the third part his entire cotton waste business, trade, and dealings, and the exclusive right to deal and do a cotton waste business with and purchase cotton waste of any and all of said corporations, for the period of five years from the date hereof.

"And said party of the first part hereby, for himself, his executors, administrators, and assigns, covenants and agrees with said parties of the second and third parts and each of them, and their executors, administrators, successors, and assigns respectively, that for and during the period of five years from the date hereof he will not either directly or indirectly, in his own name or in the name of any other person or persons, continue in, carry on, or engage in the business of manufacturing or dealing in bedquilts or comfortables, or of any business of which that may form any part.

"And he further covenants and agrees as aforesaid, that for and during said period he will not enter into the cotton waste business in said city of Fall River with any corporation, firm, or person located and doing business in said city; and especially that he will not, directly or indirectly, in his own name or in the name of any other person, buy, or influence, or procure other persons to buy, any cotton waste from said mills, in said city of Fall River, or belonging to or controlled by any corporation located in said city, and that he will not, either directly or indirectly, make any bid therefor, or influence any other person so to do, in connection with the waste business in said city, or the purchase of waste from such parties.

"And he further covenants and agrees that he will not buy or offer to buy of any person whatever the waste produced by the corporations known as the Granite Mills, Troy Cotton and

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Woolen Mills, Richard Borden Manufacturing Company, and Pocasset Manufacturing Company.

"And the said parties of the second and third parts, in consideration of the sale and delivery of said business, plant, and property, and said cotton waste business and contracts, and the faithful performance of the covenants and agreements herein made by the party of the first part, agree to purchase said business plant and property, and said cotton waste business, and to pay therefor to said party of the first part the sum of five thousand dollars in ten equal monthly instalments, the first five hundred dollars to be paid on the first day of July, 1886, and the remaining instalments on the first day of each month thereafter, until all are paid."

The declaration contained a second count, upon an account annexed, for the recovery of the same amount.

The defendants demurred to the declaration, assigning the following grounds of demurrer:

"1. That the allegations, matters, and facts set forth in said declaration, and in each count thereof, do not in law constitute a cause of action against these defendants, or either of them. 2. For the reason that the contract annexed to the plaintiff's declaration, a breach of which is set forth in the first count thereof as the cause of action relied on therein, and which contract is referred to in the second count of said declaration, for a breach of which the sums claimed in said second count purport to be due, is an unlawful contract and a contract in restraint of trade, is against public policy and void, and cannot be enforced at law. 3. That both counts appear to be for the same cause of action, and the cause of action set forth in each count arises under said contract for a breach thereof by the defendants in failing to pay the plaintiff the amount claimed in said counts; but it appears by said contract that one of the considerations for said payments was the covenants and agreements of the plaintiff therein not to manufacture or be interested in the manufacture or sale of bedquilts and comfortables, as therein set forth, anywhere whatever, and without any limitation as to place, during the period of five years therein named, and also the covenants and agreements of the plaintiff in said contract to the effect that he will not enter into competition with the Massasoit Company,

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one of the defendants, at Fall River, for the purchase of cotton waste, or bid therefor directly or indirectly against or in competition with said company for said waste; all of which agreements, covenants, and considerations are illegal and void, in restraint of trade and against public policy, and fraudulent, and said contract is illegal and void, in restraint of trade and contrary to public policy, and cannot be enforced by the plaintiff. 4. That it appears by said contract that the considerations of any and all the agreements and undertakings of the defendants therein, for a breach of which the plaintiff sues, are illegal and void, and that said contract is illegal and void, and in restraint of trade and contrary to public policy, and void."

The Superior Court sustained the demurrer, and ordered judgment for the defendants, and the plaintiff appealed to this court.

W. Gaston & C. L. B. Whitney, for the plaintiff.

R. D. Smith & H. E. Bolles, for the defendants.

C. ALLEN, J. The defendants' promise which is declared on was made in consideration of the sale and delivery of the business, plant, property, and contracts of the plaintiff, and of his faithful performance of the covenants and agreements contained in the written instrument signed by the parties. The parties made no apportionment or separate valuation of the different elements of the consideration. The business, plant, property, contracts, and covenants were all combined as forming one entire consideration. There is no way of ascertaining what valuation was put by the parties upon either portion of it. There is no suggestion that there was any such separate valuation, and any estimate which might now be put upon any item would not be the estimate of the parties.

It is contended by the defendants that each one of the three particular covenants and agreements into which the plaintiff entered is illegal and void, as being in restraint of trade. It is sufficient for us to say that the first of them is clearly so; it being a general agreement, without any limitation of space, that for and during the period of five years he will not either directly or indirectly continue in, carry on, or engage in the business of manufacturing or dealing in bedquilts or comfortables, or of any business of which that may form any part. Thus much is virtually conceded by the plaintiff, and so are the authorities. *Taylor*

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v. *Blanchard*, 13 Allen, 370. *Dean* v. *Emerson*, 102 Mass. 480. *Morse Twist Drill Co.* v. *Morse*, 103 Mass. 73. *Alger* v. *Thacher*, 19 Pick. 51. *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64. *Davies* v. *Davies*, 36 Ch. D. 359. 2 Kent Com. 466, note *e*. Met. Con. 232.

Two principal grounds on which such contracts are held to be void are, that they tend to deprive the public of the services of men in the employments and capacities in which they may be most useful, and that they expose the public to the evils of monopoly. *Alger* v. *Thacher*, *ubi supra*.

The question then arises, whether an action can be supported upon the promise of the defendants, founded upon such a consideration as that which has been described. As a general rule, where a promise is made for one entire consideration, a part of which is fraudulent, immoral, or unlawful, and there has been no apportionment made or means of apportionment furnished by the parties themselves, it is well settled that no action will lie upon the promise. If the bad part of the consideration is not severable from the good, the whole promise fails. *Robinson* v. *Green*, 3 Met. 159, 161. *Rand* v. *Mather*, 11 Cush. 1. *Woodruff* v. *Wentworth*, 133 Mass. 309, 314. *Bliss* v. *Negus*, 8 Mass. 46, 51. *Clark* v. *Ricker*, 14 N. H. 44. *Woodruff* v. *Hinman*, 11 Vt. 592. *Pickering* v. *Ilfracombe Railway*, L. R. 3 C. P. 235, 250. *Harrington* v. *Victoria Graving Dock Co.* 3 Q. B. D. 549. 2 Chit. Con. (11th Am. ed.) 972. Leake Con. 779, 780. Pollock Con. 321. Met. Con. 247.

It is urged that this rule does not apply to a stipulation of this character, which violates no penal statute, which contains nothing *malum in se*, and which is simply a promise not enforceable at law. But a contract in restraint of trade is held to be void because it tends to the prejudice of the public. It is therefore deemed by the law to be not merely an insufficient or invalid consideration, but a vicious one. Being so, it rests on the same ground as if such contracts were forbidden by positive statute. They are forbidden by the common law, and are held to be illegal. 2 Kent Com. 466. Met. Con. 221. 2 Chit. Con. 974. *White* v. *Buss*, 3 Cush. 448, 450. *Hynds* v. *Hays*, 25 Ind. 31, 36.

It is contended that the defendants, by being unable to enforce the stipulation in question, only lose what they knew or were

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bound to know was legally null; that they have all that they supposed they were getting, namely, a promise which might be kept, though incapable of legal enforcement; and that if they were content to accept such promise, and if there is another good and sufficient consideration, they may be held upon their promise. But this argument cannot properly extend to a case where a part of an entire and inseparable consideration is positively vicious, however it might be where it was simply invalid; as in *Parish* v. *Stone*, 14 Pick. 198. The law visits a contract founded on such a consideration with a positive condemnation, which it makes effectual by refusing to support it, in whole or in part, where the consideration cannot be severed.

The fact that the plaintiff had not failed to perform his part of the contract does not enable him to maintain his action. An illegal consideration may be actual and substantial and valuable; but it is not in law sufficient.

The plaintiff further suggests that, if the defendants were to sue him on this contract, they could clearly, so far as the question of legality is concerned, maintain an action upon all its parts, except possibly the single covenant in question. *Mallan* v. *May*, 11 M. & W. 653. *Green* v. *Price*, 13 M. & W. 695; *S. C.* 16 M. & W. 346. This may be so. If they pay to the plaintiff the whole sum called for by the terms of the contract, it may well be that they can call on him to perform all of his agreements except such as are unlawful. In such case, they would merely waive or forego a part of what they were to receive, and recover or enforce the rest. It does not, however, follow from this that they can be compelled to pay the sum promised by them, when a part of the consideration of such promise was illegal. They are at liberty to repudiate the contract on this ground; and, having done so, the present action founded on the contract cannot be maintained; and it is not now to be determined what other liability the defendants may be under to the plaintiff, by reason of what they may have received under the contract.

Judgment affirmed.

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INHABITANTS OF NEEDHAM *vs.* CHARLES W. MORTON & others.

Middlesex. January 17, 18, 1888. — April 6, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Tax — Collector of Taxes — Bond — Interest.

A collector of taxes, who was chosen by a town as being the lowest bidder, paid over, in accordance with his bond, the full amount of the taxes committed to him, whether actually collected or not, at the dates specified, but withheld the interest added to all taxes unpaid after a certain time by a vote of the town under the Pub. Sts. c. 11, § 67, and collected by him from the delinquent taxpayers. *Held*, that he was entitled to such interest.

CONTRACT upon two bonds given to the plaintiff, in the years 1883 and 1884, by the first-named defendant as principal, and by the other defendants as sureties, the condition of each bond being as follows:

"The condition of this obligation is such, that whereas said C. W. Morton having been chosen and duly sworn as collector for said town of Needham, for the ensuing year, — now, therefore, if the said Morton shall during the current year faithfully discharge the duties of his office by collecting all taxes to him committed by the assessors of said town, and by making all payments agreeable to collector's warrant, then this obligation shall be void, otherwise remain in full force."

Trial in the Superior Court, without a jury, before *Hammond*, J., who reported the case for the determination of this court, in substance as follows.

In both 1883 and 1884, following an ancient practice of the town, the office of collector of taxes was sold at public auction at the annual town meeting to the lowest bidder, and such lowest bidder was subsequently duly elected as such collector. In both years Morton was the lowest bidder, and was subsequently elected collector.

The warrant for each annual meeting contained an article "to see how the town will have its taxes collected the ensuing year," and the votes of the town thereat recited that "the col-

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lection of taxes be put out to the lowest bidder"; that "interest at the rate of one half of one per cent a month shall be charged on all taxes remaining unpaid after the first day of November"; and that "the collector shall guarantee and be held to pay to the treasurer the full amount of taxes committed to him for collection, except such as may be abated by the assessors, and shall not receive his commission for collecting except as he pays to the treasurer. He shall pay to the treasurer the taxes from time to time as he collects them; on or before the tenth day of November, he shall have paid him a sum equal to one half the amount of the taxes committed to him for collection; he shall pay the county tax as required by the warrant of the county commissioners; and on or before the first day of January, 1885, shall pay to the treasurer a sum equal to one half of the remainder of said taxes, and the balance on or before the first day of February, 1885. It shall be the duty of the treasurer to collect from the collector forthwith all sums not paid by him within the time specified in his warrant."

In each year the assessors issued to Morton, as collector, their warrant, which, after reciting that he was to levy and collect a State, county, and town tax, and pay over the first two taxes on certain dates, set forth that the last-named tax was to be paid over to the town treasurer on or before the dates mentioned in the above votes, and in specified amounts, aggregating the entire tax, and that "for services for collecting said taxes, by vote of said town, you are to have, as compensation therefor, the sum of one and one half per cent on the total amount, as collected by you, of the taxes contained in said list. And you are hereby ordered, in accordance with a vote passed by said town, at said meeting, and in accordance with the laws of said Commonwealth, to collect interest at the rate of six per cent upon all taxes not paid on or before the first day of November next, until fully paid." Pursuant to these warrants, the defendant Morton paid over, less his commissions to the town treasurer, in each of said years, the full amounts specified therein to be payable upon different dates, (unless the interest directed to be charged to individual tax-payers after November 1 upon uncollected taxes, by the above recited votes, should have been included in said amounts,) either upon said dates, or shortly

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subsequent thereto; and whenever delay occurred in making any of such payments, interest at the rate of six per cent from the date called for by the warrants to the date of such payments was also paid by Morton to the treasurer.

In each year, between the time fixed by the above votes at which interest upon taxes should begin to accrue, and the time at which, under the warrants, Morton's full and final payments were required to be made, he collected from individual tax-payers various sums as interest on their overdue taxes, at the rate established, which sums, together with other sums which ought to have been so collected and paid over to the treasurer, if Morton was bound to collect and pay over to him all interest received from individual tax-payers, exceeded the actual amount of interest paid by Morton to the treasurer. For such sums received as interest from individual tax-payers, and for those which should have been collected from them if the contention of the town is valid, Morton refused to account, or to pay over to the town treasurer, claiming that by the payments made by him he had fully complied with the terms of the warrants, and with his duty as collector. The plaintiff contended that, in addition to the payments made by him, Morton was liable to account for and pay over to the treasurer all sums received by him as interest on overdue taxes from individual tax-payers, and all sums chargeable as interest to individual tax-payers, whether or not the same was wholly or partially collected.

The judge also found the following to be facts, if material. For many years the town of Needham had annually elected its collector, in the manner and according to the proceedings above stated; its assessors had issued their warrants in substantially the same form as the above; and the collector had accounted with the treasurer on the basis claimed by the defendants to be the true one. During the same years the annual reports of the treasurer had been accepted by the town. All these facts were known to Morton when he bid off the taxes, and subsequently qualified as collector, and no other rule of settlement had ever been claimed by the plaintiff until after the election and qualification of Morton in the year 1884. In each of the years 1883 and 1884 Morton also accounted for and paid over to the treasurer, under his assumption and guaranty of the tax lists, large

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sums which were uncollectible, and which were paid to the treasurer out of his private funds.

The judge ruled that upon these facts the plaintiff was entitled to recover, and found for the plaintiff for the penal sum of each bond. If the ruling was wrong, judgment was to be entered for the defendants; otherwise the case was to be sent to an assessor.

The case was argued at the bar in January, 1888, and afterwards was submitted on the briefs to all the judges.

F. D. Ely, for the plaintiff.

C. A. Mackintosh, for the defendants.

DEVENS, J. To let out the collection of taxes to the lowest bidder whom the town will accept has been held not to be illegal. *Alvord* v. *Collin*, 20 Pick. 418. *Howard* v. *Proctor*, 7 Gray, 128. Such was in effect the transaction between the plaintiff town and the defendant. After the vote of the town prescribing the terms of the contract to be made by the collector, and after the bid was made, Morton was formally elected collector of taxes. The previous proceedings must be deemed to have taken place subject to the contingency that Morton should be elected, and derive their validity from such election. It is competent for the town to determine the compensation which the collector shall receive, the mode in which he shall perform his duties, and to some extent the responsibility he shall be subjected to in their performance.

By the condition of his bonds, which are here in suit, Morton was bound faithfully to "discharge the duties of his office by collecting all taxes to him committed by the assessors of said town, and by making all payments agreeable to collector's warrant." By the vote of the town the collector was held to pay to the treasurer the full amount of the taxes committed to him for collection except such as might be abated by the assessors, and his bond required him to pay these in certain specified sums at certain dates. These payments added together amount to the sum of the whole tax. He was obliged to make these payments whether he had or had not, using all reasonable diligence, actually made sufficient collections therefor at the dates specified. These payments he has made substantially at the times specified in his bond, paying interest on all the sums overdue

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according to his contract when any delay has occurred in such payments.

The Pub. Sts. c. 11, § 67, provide that the town "may vote that, on all taxes remaining unpaid after a certain time, interest shall be paid at a specified rate, ... and the interest accruing under such vote . . . . shall be added to, and be a part of, such taxes." The town by its votes fixed a certain time when interest would begin to accrue on taxes overdue, and the warrant authorized Morton to collect the same, and various sums were collected by him as interest on overdue taxes, which sums added to other sums of interest on overdue taxes, which ought to have been collected and paid over to the treasurer, if Morton was bound to collect and pay over all interest due from individual tax-payers, exceeded the amount of interest paid by Morton on delayed payments as above stated. It is the contention of the plaintiff, that Morton was liable to account for and pay over to the treasurer all sums thus received by him as interest on overdue taxes from individual tax-payers, and also on all sums chargeable as interest to individual tax-payers, whether or not the same were wholly or partially collected.

It would not be doubted, in case of a collector paid by a fixed salary or commissions, and not made responsible to pay over the whole tax at specified dates fixed arbitrarily by the town for its own convenience, that the town would be entitled to insist upon the collection of the sums of interest due from individual tax-payers, and the payment of them to the treasurer. But the interest thus collected is intended to compensate the town for the inconvenience to which it has been subjected by the delinquency of the tax-payer, and not as a substantive addition to its revenue. Whether the individual tax-payer paid promptly or not, by the contract it had made it received the original tax at the precise times it required. Even if the taxes were never collected except so far as they were abated by the assessors, the town was to receive, and did receive, the full amount of them. It is found that in each of the years to which the bonds relate, Morton has accounted for and paid over to the treasurer, under his assumption and guaranty of the tax lists, large sums which were uncollectible, and which were in fact paid from his private funds. Neither delay in payment nor actual non-payment made

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any difference to the town under the contract it had made; the collector bore the burden of each. While the statute authorizes these sums of interest to be treated as a part of the taxes, the fair construction of the defendant Morton's bond is, that he is to account for the taxes there described, which are the taxes originally assessed, and not for additions thereto which arise from the default of individuals. The payments which he is bound specifically to make are arithmetical divisions which together equal the sum assessed. There is no provision that in any event he shall pay more. If he is obliged to do this, the curious anomaly results that the town may receive interest twice on the same sum, once on account of non-payment by the collector to it, and again by the failure to pay the collector.

In consideration of the guaranty of its taxes, and of the payment of them at the specified times, the town intended to place the collector in its own situation so far as the collection of them was concerned, and to give to him the same remedies with which it was provided when there was delinquency on the part of the tax-payer. Such was the object of the vote imposing interest upon the delinquent, and it should go to him who, under the contract between the plaintiff and the defendant, has suffered by the delay. The bond was not made with reference to it, nor could it have been so made in the form adopted for the payment of specified sums at fixed dates, as it was entirely uncertain what sum the interest upon these overdue payments would amount to, or indeed whether there would be any.

Without considering whether the plaintiff is estopped by reason of its conduct in former years, or by any assent given to settlements of former contracts with its treasurer on this basis, it certainly tends to show that the construction we have given is the natural one, when it is observed that the town officers, and, so far as known to it, the town, have recognized this as the one to be adopted. *Judgment for the defendants.*

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BRAINTREE WATER SUPPLY COMPANY *vs.* INHABITANTS OF BRAINTREE.

Norfolk. January 23, 24, 1888. — April 6, 1888.

Present: MORTON, C. J., W. ALLEN, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Corporation — Water Company — Contract — Rescission — Commissioners.

The St. of 1886, c. 269, chartered a water company, and in § 10 authorized it to sell its franchise and property, and a town to purchase them by a two-thirds vote at a meeting called for that purpose, and provided for the appointment of commissioners to fix the price in case of disagreement. At such a meeting, under an article in the warrant "to see if the town will vote to purchase the same," the requisite vote was in the affirmative, but at a subsequent meeting the vote was rescinded. *Held*, that the vote to purchase completed a contract, from which the town could not withdraw.

The water company, which organized without observing the Pub. Sts. c. 105, § 9, as to notice, before its capital was paid in or entirely subscribed for, made a price to the town after its vote to purchase through a town committee, and, upon no action being taken thereon, filed a petition for the appointment of commissioners. *Held*, that the company must be taken to be legally organized, and that the petition was properly brought in its corporate name.

PETITION praying for the appointment of commissioners under the St. of 1886, c. 269, § 10, to determine the price to be paid by the respondent for the franchise and property of the petitioner, alleging that the parties were unable to agree on such compensation. Hearing before *Field*, J., who dismissed the petition and reported the case for the consideration of the full court, upon an agreed statement of facts, in substance as follows.

The records of the petitioner showed that, pursuant to the call of one of the incorporators named in the St. of 1886, c. 269, § 6, a meeting was held on June 9, 1886, for the purpose of organization, when four out of the six persons named in the statute were present. A temporary chairman and temporary clerk were chosen, also a board of directors, and a president. A clerk was also chosen and sworn. There was no other evidence of the notice of this meeting, or that the temporary clerk was elected by ballot, or sworn. The records further showed, that the second meeting was held on September 15, 1886, at which the written resignations of two directors were received, and others were chosen in

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their places. It was voted that a tract of land be taken for the purposes named in the statute, and that the taking be recorded in the registry of deeds, which was subsequently done; that the capital stock be fixed at $100,000, and that books be opened for subscriptions; and "that the corporation authorize the directors to contract for the complete construction of the works of the company, and to pay therefor by the issue of stock and bonds not exceeding the full amount authorized by the charter, and do hereby authorize the issue of bonds bearing interest at a rate not exceeding six per cent per annum, the same to be secured by a mortgage on the franchises and other property of the corporation, to an amount not exceeding its capital stock actually paid in, and the directors are hereby authorized to execute said mortgage and to issue said bonds, and to take such other action as may be necessary for the full carrying out of this vote."

Eight persons subscribed, under date of September 20, 1886, for one share each, but no certificates of stock were ever issued thereon, and no payments were ever made on account of the subscriptions.

On October 18, 1886, an adjourned meeting was held, at which it was voted to contract with Wheeler and Parks, contractors, for the construction of the works, and on October 19, 1886, the petitioner entered into a contract with them, by which the franchise and other property was to be mortgaged to secure an issue of bonds, to be delivered to them, and all the bonds and stock less the subscriptions which could be issued under its charter were to be turned over to them in payment for the building of the works.

A meeting of the respondent town was held on January 12, 1887, in pursuance of a warrant containing the following: "Article 3d. To see if the town will vote to purchase the franchise, corporate property, and all the rights and privileges of the Braintree Water Supply Company, according to the provisions of section ten of chapter two hundred and sixty-nine of the Acts and Resolves of the Legislature of the Commonwealth of Massachusetts of the year 1886, and to appoint any committee which it may deem expedient in relation thereto." It was voted "that the town proceed to ballot — yes or no — by

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the use of the check list, on the third article of the warrant." Tellers were appointed by the moderator to check the list, and were sworn by the town clerk. The ballot having been taken, the moderator announced the result as follows: Whole number of ballots, 313. Yeas, 256; noes, 57. Necessary for its adoption, 209; being two thirds of the whole number of ballots cast. The moderator then declared the motion adopted. The meeting was then adjourned to January 25, 1887, when it was further voted that a committee be chosen to "negotiate on behalf of the town with the duly authorized officers of the Braintree Water Supply Company, for the purpose of ascertaining what price or compensation shall be paid by the town for the franchise, corporate property, and other rights and privileges of said corporation; that this committee be and hereby is instructed to examine all records, votes, books of account, and vouchers, relating to the formation and business affairs of said corporation; to examine all contracts entered into by said corporation, to report at a town meeting to be called for the purpose of hearing said report and acting thereon; to cause said report to be printed and circulated throughout the town three days at least before the day of the holding of said meeting, and to do such other things as may be necessary in the premises"; and a committee of five was appointed.

This committee met the directors of the petitioner on February 5, 1887, at which time the president said that the company was not in the market for sale; that the directors did not wish to sell, but they recognized the right of the town to purchase under the statutes; that the meeting was somewhat preliminary; and that the company at an early date would submit to the committee a proposition in writing. On February 9, 1887, the proposition was submitted to the committee by the president, which, after reciting the making of the contract with Wheeler and Parks, stated that the petitioner "will sell to the town of Braintree, for the sum of twenty-three thousand dollars ($23,000) our franchise, corporate rights and privileges, together with all the rights and interests in any contract which we now have for supplying water to persons or corporations, and will assign all our rights in the contract for the building of the works, provided that the contractors assent to the same."

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A few days after this proposition was received, a sub-committee visited the office of the company, and an opportunity was there given them to examine the records, contracts, and other papers of the company, which was availed of. The next town meeting was held on February 23, 1887, at which the report of the committee, which had been previously printed and circulated throughout the town, was read, and immediately laid upon the table, without any further action whatsoever upon it.

The next meeting of the town was held on March 10, 1887, at which it was duly voted "to rescind its vote passed January 12, 1887, to purchase the franchise, corporate property, and all the rights and privileges of the Braintree Water Supply Company, according to the provisions of section 10 of chapter 269 of the Acts and Resolves of the Legislature of the Commonwealth of Massachusetts of the year 1886."

R. M. Morse, Jr., & M. Morton, Jr., for the petitioner.

B. F. Butler & E. Avery, for the respondent.

KNOWLTON, J. By the St. of 1886, c. 269, the Braintree Water Supply Company was incorporated, for the purpose of furnishing the inhabitants of the town of Braintree with water. The act of incorporation conferred upon the company extensive powers, and also secured to the town the right to obtain the property and franchise of the corporation, and to control the business of supplying its inhabitants with water, whenever it should choose so to do. Section 10 of this act is as follows: "The said town of Braintree shall have the right, at any time during the continuance of the charter hereby granted, to purchase the franchise, corporate property, and all the rights and privileges of said corporation, at a price which may be mutually agreed upon between said corporation and the said town; and the said corporation is authorized to make sale of the same to said town. In case said corporation and said town are unable to agree, then the compensation to be paid shall be determined by three commissioners, to be appointed by the Supreme Judicial Court, upon application of either party and notice to the other, whose award, when accepted by said court, shall be binding upon all parties. This authority to purchase said franchise and property is granted on condition that the same is assented to by said town by a two-thirds vote of the voters present and

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voting thereon at a meeting called for that purpose." The fundamental question in the case is, What were the rights and obligations of the respective parties under this section?

An important part of the chapter relates to the powers and duties of the town in managing the business of furnishing water in case it should purchase the property and franchise of the petitioner, and the intention of the Legislature to give the town the right to take this business in charge is manifest.

The authority conferred was not the power to take property by an exercise of the right of eminent domain, but it was somewhat analogous to it. It was an authority to the town to determine absolutely by its own act in the form of a two-thirds vote, at any time during the continuance of the charter, that the petitioner's property and franchise should become its own. The statute calls it a right to purchase, and seems to contemplate a transfer of title in the form of a sale, and the execution of some proper instrument as evidence of the transfer. For if the town should vote to purchase after the petitioner's works had been constructed, there might be a great variety of property, real and personal, to be transferred, and no way is pointed out in which the town could obtain and preserve in convenient form the evidence of its title except through an instrument of sale. But as a preliminary to fixing the rights of both parties, of one to have the franchise and property, and the other to have the pay for it, no writing and no negotiation was required, — nothing but the vote of the town declaring its determination.

The Legislature conferred upon the company the corporate franchise, with a condition annexed in favor of the town. By accepting its charter, the corporation impliedly agreed to sell, whenever the town by vote should decide to buy. The legal relation of the parties was as if the corporation had made in writing a continuing offer to sell, at a price to be subsequently agreed upon by the parties, and in default of agreement to be fixed by commissioners. The vote of the town to buy was an acceptance of the offer, which completed the contract. The rights of the parties were then the same as if both had signed an executory contract, binding one to sell and the other to buy, at a price to be agreed between them, or determined under the statute. Neither party could then defeat the right of the other

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to have the contract executed. By the terms of the statute, it was to be specifically performed.

The town might, if it had chosen, have declined to avail itself of the offer, held out to it under this statute, to purchase at a price to be afterwards fixed, and have voted, under the authority of the Pub. Sts. c. 27, § 27, and perhaps of this statute also, to negotiate with the corporation in reference to making a purchase at a price to which both should agree. But the vote taken at the meeting of January 12, 1887, was not to make a purchase if a satisfactory price could be agreed upon. It was plainly an exercise of the town's legal right to buy, at a price to be subsequently fixed. The article in the warrant under which the ballot was taken was carefully drawn, with express reference to the provisions of the section which we have quoted. The committee appointed on January 25, 1887, was, in the language of the vote, "for the purpose of ascertaining what price or compensation shall be paid by the town for the franchise, corporate property, and other rights and privileges of said corporation." The town's original action was correctly interpreted by the town itself, when it voted at a subsequent meeting "to rescind its vote passed January 12, 1887, to purchase the franchise, corporate property, and all the rights and privileges of the Braintree Water Supply Company, according to the provisions of section 10 of chapter 269" of the statute of 1886. And this action gave the petitioner rights which the subsequent rescission of the vote could not take away. *Nelson* v. *Milford*, 7 Pick. 18. *Woodbridge* v. *Cambridge*, 114 Mass. 483. *Hall* v. *Holden*, 116 Mass. 172.

It is argued that the petitioner entered into a contract with Wheeler and Parks, which prevented the vote from taking effect. But this argument is not well founded. The corporation might go on under its charter, and make any proper contracts for the construction of its works, and for conducting its business. No contract that it might make could deprive the town of the right to purchase its property and franchise under the statute, or prevent the appointment of commissioners to determine the price to be paid. Any contract in terms inconsistent with the exercise of that right would be contrary to the statute, and void as against the town. Any contract properly made in carrying on

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its business would be binding upon it. Section nine of its charter authorized a mortgage of its franchise and property under certain limitations, but it does not appear that the mortgage mentioned in the vote of September 15, 1886, and stipulated for in the contract of October 30, 1886, was ever made.

The respondent contends that the corporation was never so organized as to be capable of selling its franchise or property, or of maintaining this petition. It must be remembered that this is a corporation created by a charter, and that neither payment for its capital stock, nor even subscription for all of it by individuals, was a necessary preliminary to organization, or to the transaction of business by it. The provisions of the Pub. Sts. c. 105, § 9, in relation to organization, are merely directory, and are intended to secure to all members of a corporation their right to participate in its proceedings. If all the members consent to an organization which disregards the statute requirements as to notice, the organization is valid. *Newcomb* v. *Reed*, 12 Allen, 362. *Walworth* v. *Brackett*, 98 Mass. 98. The proof of the act of incorporation, of the action under it, and of the dealings of the respondent with the petitioner as such corporation, is presumptive evidence that the corporation was legally organized, and is sufficient for the maintenance of a petition in the corporate name. *Narragansett Bank* v. *Atlantic Silk Co.* 3 Met. 282. *Middlesex Husbandmen* v. *Davis*, 3 Met. 133. *Worcester Medical Institution* v. *Harding*, 11 Cush. 285. *Appleton Ins. Co.* v. *Jesser*, 5 Allen, 446. *Topping* v. *Bickford*, 4 Allen, 120. *Hawes* v. *Anglo-Saxon Petroleum Co.* 101 Mass. 385.

The neglect of the town to act upon the report of its committee containing the offer of the petitioner, shows that the parties were unable to agree upon the compensation to be paid. Indeed, bringing this petition, without evidence of negotiation or of attempts to negotiate, would be enough to satisfy the requirements of the statute in regard to that. *Burt* v. *Brigham*, 117 Mass. 307. *Ætna Mills* v. *Waltham*, 126 Mass. 422.

Upon the facts agreed, we think the allegations of the petition are established, and that commissioners should be appointed to determine the compensation to be paid by the respondent for the franchise and property of the petitioner.

Ordered accordingly.

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MARK SENNOTT'S CASE.

Suffolk. February 3, 1888. — April 6, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, & KNOWLTON, JJ.

Habeas Corpus — Juvenile Offender — Writ of Error.

A juvenile offender sentenced by a police court to be "committed to the State Board to be sent to the Lyman School" for breaking and entering, and placed in that school under a mittimus, issued after the St. of 1886, c. 101, § 5, took effect, which, omitting his age, ordered his delivery to the State Board of Health, Lunacy, and Charity, cannot be discharged on habeas corpus, but his remedy is by writ of error.

HABEAS CORPUS to the superintendent of the Lyman School for Boys, issued on November 7, 1887, upon the petition of Martin Sennott, verified by his oath, which represented that his son, Mark Sennott, a minor of the age of fourteen years, was unlawfully restrained of his liberty by the superintendent of that school; and that the superintendent was holding him upon a mittimus issued by the Police Court of Fitchburg upon a judgment of that court rendered against him upon a complaint charging him with breaking and entering, the record of which judgment was as follows:

"Commonwealth of Massachusetts. Worcester ss. By virtue of a warrant issued on this complaint, the defendant is before the Police Court of Fitchburg, in the county of Worcester, on the eighth day of July, A. D. 1887, and said complaint is read to him, and he says that thereof he is not guilty. Continued to July 12, when, after hearing all matters and things concerning the same, it is adjudged by the said Police Court, that said defendant is guilty. Continued to August 9, for sentence. When it is thereupon ordered by the said Police Court, that the said defendant be committed to the State Board, to be sent to the Lyman School. Committed. Wylm G. Hayes, Clerk."

The mittimus was as follows:

"Commonwealth of Massachusetts.

"Worcester ss. To the sheriff of our county of Worcester, his deputy, any constable of the Commonwealth, or any con-

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stable of any town or city in said county, the State Board of Health, Lunacy, and Charity, the visiting agent of said board, or either of his assistants, Greeting:

"You are hereby commanded, in the name of the Commonwealth of Massachusetts, forthwith to convey and deliver into the custody of the State Board of Health, Lunacy, and Charity, the body of Mark Sennott, a boy between seven and seventeen years of age, now before the Police Court of Fitchburg, in said county, on complaint of C. H. D. Stockbridge, made under oath, against said defendant, for that said defendant, heretofore, to wit, on the third day of July, in the year eighteen hundred and eighty-seven, at Fitchburg, in said county, the store of W. W. Smith, there situate, did break and enter, with intent the goods and chattels in the same store then and there being to steal, take, and carry away, and then and there, two revolvers, of the value of six dollars, of the money, goods, and chattels of W. W. Smith, in the same store then and there being found, then and there in the same store did steal, take, and carry away.

"And, after hearing all matters and things concerning the same, and all persons entitled thereto, having been duly summoned and notified of the pendency of said complaint, as required by law, it is adjudged by said court that said defendant is guilty, and it appears that he is of the age of years and months, and upon request of the visiting agent of the State Board of Health, Lunacy, and Charity, said board is hereby authorized to take and indenture, or place in charge of any person, or in the Lyman School, said boy, till he attains the age of twenty-one years, or for any less time; and if said boy prove unmanageable, to transfer and commit him to the State Reform or Industrial School, subject to such conditions as are now defined by law for admission to said schools, till he attains the age of twenty-one years, or for any less time, or until he is otherwise discharged in due course of law.

"Witness, Thornton K. Ware, Esquire, at Fitchburg, this ninth day of August, in the year of our Lord one thousand eight hundred and eighty-seven. Wylm G. Hayes, Clerk."

The return upon the mittimus, dated August 9, 1887, and signed by a constable of Fitchburg, set forth that "by virtue of this warrant I have this day conveyed and delivered the body of

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the within named defendant into the custody of the State Board of Health, Lunacy, and Charity, as within directed."

At the hearing before *Devens*, J., where it appeared that Mark Sennott was a boy between seven and seventeen years of age, and that he was held in custody by the superintendent solely by virtue of the mittimus, the petitioner moved that he be discharged from his imprisonment for the following reasons: "1. Because he says the Police Court had no jurisdiction, and its judgment is void, in that the record discloses the fact that the case was disposed of contrary to the laws of said Commonwealth which provide for the trial of juvenile offenders. 2. Because the mittimus issued on said judgment is irregular, and contrary to the laws of said Commonwealth, and the imprisonment of said boy by virtue thereof is unlawful."

The judge overruled the motion, and ruled that, the judgment having been rendered by a court which had jurisdiction of the person and offence, the validity of its judgment and commitment could not be inquired into on a writ of habeas corpus, but must stand until reversed on a writ of error; and reported the case for the consideration of the full court. If the ruling was right, the prisoner was to be remanded; otherwise he was to be discharged.

T. F. Gallagher, for the petitioner.

H. C. Bliss, Assistant Attorney General, for the Commonwealth.

KNOWLTON, J. This is a writ of habeas corpus to the superintendent of the Lyman School for Boys, at Westborough, issued by the Superior Court, upon a petition alleging that the petitioner's minor son, Mark Sennott, aged fourteen years, was unlawfully imprisoned and restrained of his liberty by said superintendent. It appeared at the hearing that this boy was held under the authority of a mittimus issued upon a judgment of the Police Court of Fitchburg, and the record of the case was introduced. The petitioner contends that the Police Court had no jurisdiction, that its proceedings were irregular, and that its judgment was void, because it appears by the record that the case was disposed of contrary to the laws in relation to the trial of juvenile offenders. He also contends that the mittimus was irregular and illegal, and that therefore the boy should be discharged from imprisonment.

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The record shows that Mark Sennott was brought before the court to answer to a complaint in due form, charging him with breaking and entering a building with intent to commit the crime of larceny therein, and with stealing two revolvers in said building. He was between seven and seventeen years of age.

Upon these facts there can be no doubt that the court had jurisdiction of his person, and of the offence with which he was charged. Pub. Sts. c. 89, §§ 18–24. St. 1883, c. 110. St. 1884, c. 255, § 11; c. 323. The record is not full enough certainly to show whether or not there was any irregularity in the proceedings prior to the imposition of sentence, but so far as appears every requirement of the law was complied with. The final judgment was that he was guilty, and that he should "be committed to the State Board, to be sent to the Lyman School." If there was in the sentence or the prior proceedings any irregularity affecting the validity of the judgment, it can be corrected upon a writ of error. But neither irregularities nor errors, so far as they were within the jurisdiction of the court, can be inquired into upon a writ of habeas corpus. *Clarke's case*, 12 Cush. 320. *Herrick* v. *Smith*, 1 Gray, 1, 50. *Adams* v. *Vose*, 1 Gray, 51. *Ex parte Watkins*, 3 Pet. 193. *Ex parte Siebold*, 100 U. S. 371, 373. *In re Underwood*, 30 Mich. 502. *Platt* v. *Harrison*, 6 Iowa, 79.

That a writ of habeas corpus cannot perform the functions of a writ of error, in relation to proceedings of a court within its jurisdiction, is universally agreed. The only conflict of authority touching the subject is in regard to what acts are open to inquiry upon the question of jurisdiction. It is held in this State, and by good authorities elsewhere, that the constitutionality of a law which a court is attempting to apply, lies at the foundation of the jurisdiction under it, and may be called in question upon habeas corpus. *Herrick* v. *Smith*, 1 Gray, 1, 49. *Ex parte Siebold*, 100 U. S. 371. *People* v. *Roff*, 3 Park. Cr. Rep. 216. But this doctrine has been contradicted, and action founded upon an unconstitutional law has been held a mistake which can only be corrected upon a writ of error. *In re Harris*, 47 Mo. 164. So there has been diversity of opinion among different courts as to sentences which are not authorized by law. The better rule seems to be, that where a court has jurisdiction of the person, and of the

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offence, the imposition by mistake of a sentence in excess of what the law permits is within the jurisdiction, and does not render the sentence void, but only voidable by proceedings upon a writ of error. *Ross's case*, 2 Pick. 165. *Feeley's case*, 12 Cush. 598, 599. *Semler, petitioner*, 41 Wis. 517. *Ex parte Shaw*, 7 Ohio St. 81. *Ex parte Van Hagan*, 25 Ohio St. 426. *Phinney, petitioner*, 32 Maine, 440. *Kirby* v. *State*, 62 Ala. 51. *Lark* v. *State*, 55 Ga. 435. It has sometimes been held that such a sentence is legal so far as it is within the provisions of law, and void as to the excess. *People* v. *Jacobs*, 66 N. Y. 8. *People* v. *Baker*, 89 N. Y. 460. *Bigelow* v. *Forrest*, 9 Wall. 339.

The leading cases of *Ex parte Lange*, 18 Wall. 163, and *People* v. *Liscomb*, 60 N. Y. 559, do not decide that a sentence which is merely erroneous and excessive through a mistake of law is void, in such a sense as to make an officer liable for executing it, or to call for a discharge upon habeas corpus of a person held under it. Indeed, in the former case, Mr. Justice Miller in his opinion, at page 174, asserts that it is not. The principle upon which this case goes is, that when a court has once imposed a sentence, whether in accordance with law or not, which has been served or performed in whole or in part, it has no jurisdiction to impose another, either in addition to or in substitution for the first. And the case of *People* v. *Liscomb* rests upon similar grounds. See also *People* v. *Jacobs*, 66 N. Y. 8.

The rule to which we have referred does not necessarily imply that every judgment which a court having jurisdiction of a person and of his offence might render would be held to be within its jurisdiction, and not open to inquiry upon habeas corpus. It is always a pertinent question, whether or not the act under consideration was done in the exercise of the existing jurisdiction. *Clarke's case*, 12 Cush. 320. *Adams* v. *Vose*, 1 Gray, 51. And we can conceive of a sentence so foreign to the law, and to the case before the court, and so far in excess of the power conferred upon the court, as to furnish ground for an argument that it was not merely erroneous, but entirely outside of the jurisdiction.

But it is unnecessary to determine how such a sentence should be regarded, for the irregularity of that in the case at bar was nothing more than an error. Under the Pub. Sts. c. 89, § 23,

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the boy might be committed to the State Reform School, now the Lyman School for Boys. St. 1884, c. 323. By § 22 of the same chapter it is provided that the court, "upon request of the State Board, may authorize said board to take and indenture, or place in charge of any person, or in the State primary school, or, if he or she prove unmanageable, to commit to the reform or industrial school such boy or girl till he or she attains the age of twenty-one years, or for any less time." The record shows that the defendant was to "be committed to the State Board, to be sent to the Lyman School." No part of this sentence was in excess of the authority of the court. The law authorized commitment directly to the Lyman School under § 23, or commitment to the custody of the State Board of Lunacy and Charity under § 22, with authority in them to commit him to the Lyman School if he proved unmanageable. Construing the language of the record strictly, it seems to contemplate a disposition of the boy not in accordance with the provisions of either section of the statute, but depending in part upon one, and in part upon the other. This is an error which does not entitle the defendant to a discharge upon habeas corpus, and which can be corrected only by proceedings looking directly to that end. Under such proceedings, the court can render such judgment as should have been rendered at first. Pub. Sts. c. 187, § 13.

The mittimus follows the judgment, and most of the objections to it are covered by what we have already said. If the directions contained in the Pub. Sts. c. 89, § 24, as to certifying in the warrant for commitment the boy's age, place of residence, and such other particulars as can be ascertained concerning him, are applicable to a commitment under § 22, they are merely directory, and the omission of them does not invalidate the warrant.

The State Board named in two places in the mittimus is called the State Board of Health, Lunacy, and Charity. The St. of 1886, c. 101, § 5, provides, that "the board heretofore known as the State Board of Health, Lunacy, and Charity shall be hereafter called the State Board of Lunacy and Charity." The judgment of sentence used the words "State Board" alone, which are the words of § 22 of the Pub. Sts. c. 89, and which mean, under the present law, State Board of Lunacy and Charity. The

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mittimus recites the record, but uses the former name of the board. Under the mittimus the defendant was taken to the Lyman School, which is under the general supervision of this board. Pub. Sts. c. 79, §§ 2, 3, 5. Taking the mittimus in all its parts, and reading it in connection with the statutes of the Commonwealth, it is so manifest that the name "State Board of Health, Lunacy, and Charity" was so written by a clerical error, and that the State Board of Lunacy and Charity was meant, that we cannot hold the process void. Besides, we have the judgment before us. The imprisonment rests upon the judgment, and the mittimus is important only as a direction to the officer, and as evidence of the authority which the judgment gives. *People* v. *Baker*, 89 N. Y. 460. See also *Ex parte Gibson*, 31 Cal. 619; *Ex parte Kellogg*, 6 Vt. 509, 511. *Prisoner remanded.*

JAMES W. DUNPHY *vs.* TRAVELLER NEWSPAPER ASSOCIATION & others.

Suffolk. February 1, 1888. — April 6, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Corporation — Equity Pleading — Multifariousness — Laches.

A bill in equity by a stockholder, for himself and other stockholders, brought against the corporation and a part only of the directors, for wrongful mismanagement, is not maintainable unless it shows that redress has been sought of the corporation itself, or of the existing board of directors, or that such seeking would be useless; and this requirement is not satisfied by an allegation that one of the directors, who is a party defendant, controls the majority of the stock, and elects such a board as he may choose, but with no averment of fraud or misconduct on the part of the other directors.

The joinder, in a bill in equity by a stockholder to secure the payment of dividends, of a request that such be paid out of moneys on hand, and a demand that the corporation should seek the restitution of moneys misapplied by it for the making of further dividends, does not make the bill multifarious.

Such a bill is not maintainable for former dividends wrongfully withheld from certain stockholders not made parties plaintiff.

A bill in equity, filed in December, 1886, alleged that improper investments had been made by a corporation, the last but one being in 1881, as appeared in its books, while the plaintiff was a director or treasurer, but did not aver fraud in the

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making or objection, or ignorance on his part; that the salary of the president had been raised for a term ending in 1875; and that a loan of money had been obtained in 1874, upon which interest was thenceforth paid. *Held*, that the plaintiff had been guilty of such laches as to prevent his maintaining the bill.

KNOWLTON, J. The plaintiff brings this bill in equity, filed on December 18, 1886, as a stockholder in the defendant corporation, in behalf of himself and such other stockholders as may join him therein, alleging that Roland Worthington, one of the defendants, is the president and treasurer of said corporation, and is and for a long time has been the owner or controller of a majority of the shares of its capital stock, and by means of his ownership and control has chosen such persons to be directors as he has seen fit; and has improperly used and invested large sums of the money of the corporation in certain specified ways, and has kept other large sums of its money on hand drawing no interest, and has improperly received large amounts as his salary as president of the corporation, and as rent for a building owned by him and occupied by it, and has prevented the making of dividends upon the capital stock, and has otherwise improperly managed the affairs of said corporation, to the great damage of the plaintiff and other stockholders. The plaintiff prays that said Worthington may be directed to render accounts of all his dealings with the assets of the corporation, and to refund all moneys improperly received or paid out by him, and to pay to certain stockholders such sums of money as shall equalize among all the stockholders certain distributions alleged to have been irregularly made among some of them, and to file a correct statement in detail of all the present assets and liabilities of the corporation, and hereafter annually to render accounts of his dealings with it as treasurer so long as he holds that office. He also prays that all funds of the corporation on hand in excess of five thousand dollars be ordered distributed among the stockholders at once, and that the corporation be required hereafter to declare dividends as often as the cash on hand shall equal five per cent of the amount of its capital stock, and for general relief.

Courts of equity are swift to protect helpless minorities of stockholders of corporations from the oppression and fraud of majorities. But the legal relations into which the members of a

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corporation enter require them to seek redress for supposed wrongs done them as stockholders from its officers, and from the corporation itself, before applying elsewhere. Misconduct in dealing with a corporation, or in the management of its affairs, can affect its members only through the corporation itself. The wrong in such a case is done primarily to the corporation. It is the duty of its directors or other managing officers to protect it from those who would do it injustice, and to seek compensation for any injury which it receives. Stockholders in a corporation impliedly agree, when they join it, to act in the corporate business through officers chosen to represent them, or by vote at meetings of the members regularly called. And so, if they deem themselves aggrieved as shareholders by the dealings of others with it, or by the acts of its managers, they are bound to seek their remedy through corporate channels, first, by application to the officers in charge, and, failing there, secondly, to the corporation itself, at a meeting of its members. If they can obtain justice at the hands of neither, the courts are open for their relief.

It would be contrary to the fundamental principles of corporate organization to hold that a single shareholder can at any time launch the corporation into litigation to obtain from another what he deems to be due to it, or to prevent methods of management which he thinks unwise. Intelligent and honest men differ upon questions of business policy. It is not always best to insist upon all one's rights; and a corporation acting by its directors, or by vote of its members, may properly refuse to bring a suit which one of its stockholders believes should be prosecuted. In such a case the will of the majority must control. It is only when the action of a corporation in refusing to proceed at the request of a stockholder is fraudulent as against him, or in disregard of his rights, that he can maintain a suit in his own name in the corporate right. The court cannot interfere with the management of corporations in matters which are properly within their discretion, so long as their discretion is fairly exercised, and it is always assumed until the contrary appears, that they and their officers obey the law, and act in good faith towards all their members. Even when their acts are *ultra vires*, or otherwise illegal, a complaining member must

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first seek his remedy within the corporation. The only exception to the rule that a stockholder must apply to the directors, and also if need be to the corporation, for redress of a wrong done it, before he can sue in a court of equity, for himself and in behalf of other stockholders, is when it appears that such application would be unavailing to protect his rights. *Brewer* v. *Boston Theatre*, 104 Mass. 378. *Allen* v. *Wilson*, 28 Fed. Rep. 677. *Hawes* v. *Oakland*, 104 U. S. 450. *Detroit* v. *Dean*, 106 U. S. 537. *Dimpfell* v. *Ohio & Mississippi Railway*, 110 U. S. 209. *Foss* v. *Harbottle*, 2 Hare, 461. That may happen when the directors themselves are the wrongdoers, or are in fraudulent combination with them, or when the corporation is controlled by them, or when it is necessary that action should be taken too speedily to leave time for a corporate meeting of stockholders.

In the case at bar there is an averment that Roland Worthington, the alleged wrongdoer, has for a long time controlled a majority of the stock, and has elected such persons directors as he chose. That states a sufficient reason for not applying to the corporation, at a meeting of its members, for action to redress its wrongs. But it is not alleged that the plaintiff ever attempted to move the directors in the interest of the corporation in the matters complained of, or that any good reason existed for his failure so to do. It does not even appear who or how many the directors are. It is said that the defendants Roland Worthington and Roland Worthington the younger are directors, but no others are named. The law provides that there shall be at least three, and it is to be presumed that there are others besides these defendants. Rev. Sts. c. 38, § 3. Pub. Sts. c. 106, § 25. There is no allegation of fraud, or of wrongful combination with Roland Worthington, or of other misconduct, on the part of any of them. And it cannot be presumed, in the absence of such averments, that they would refuse to do their duty if their attention were called to it.

In *Brewer* v. *Boston Theatre*, *ubi supra*, — a much stronger case for the plaintiff than this, — an allegation was in these words: "A majority of the present board of directors of said defendant corporation are acting in the interest of, and are under the control of, Tompkins and Thayer," the authors of the alleged

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frauds; and it was held that this allegation did not set forth a sufficient reason for bringing a suit without first requesting the directors to do it.

For the reasons which we have stated the demurrer must be sustained; but inasmuch as the bill may be amended, it may be well to consider some other objections made by the defendants.

It is contended that the bill is multifarious because it joins a claim for a restitution of property to the corporation with a claim for a payment of a dividend, and it is argued that in one part of his case the plaintiff moves through the equity of the corporation against a wrongdoer, and in the other he moves directly against the corporation itself. Looking at these parts of the case as separate proceedings, the argument has great weight. But we think the relief sought should be more broadly viewed. Upon the plaintiff's theory, he and other stockholders have been wronged by a course of proceeding in which all the defendants have participated. The substance of his complaint is, that they have kept from him profits to which he is entitled, and he brings his bill to obtain those profits. He suggests misconduct of the corporation in refusing to make dividends of money which it has on hand, and alleges that Roland Worthington is the author of this misconduct, and has personally joined in it as controller of the corporate action. He suggests that other profits which should have been divided have been kept from him through misconduct of said Worthington in improperly paying out and investing money of the corporation, and in improperly appropriating its money to his own use, and that the corporation has participated in this wrong, in not preventing it nor taking measures to redress it. He prays for a dividend of moneys in the hands of the corporation which it refuses to divide, and of other moneys in the hands of Worthington which it should first obtain and then divide. Both branches of the case are essential to the complete relief of the plaintiff. Worthington and the corporation are parties interested in both, and there is no difficulty in trying both together. We are of opinion that the bill is not multifarious. See *Lenz* v. *Prescott*, 144 Mass. 505; *Pointon* v. *Pointon*, L. R. 12 Eq. 547; *Coates* v. *Legard*, L. R. 19 Eq. 56; *Kennebec Railroad* v. *Portland Railroad*, 54 Maine, 173.

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It is obvious that the bill cannot be maintained to obtain payments for the stockholders Morss and Spaulding of the sums which it is alleged should have been paid them when distributions were made to other stockholders in 1869, 1870, and 1871. Their rights in relation to these distributions cannot be affected by this suit. They are not made parties to it, and this plaintiff is not in a position to represent their equity before the court.

It is contended that, as to most of the matters complained of, the bill shows such knowledge and acquiescence on the part of the plaintiff as precludes him from obtaining equitable relief, and that, even if he made objection, he is barred by reason of laches. It is a familiar principle of equity jurisprudence, that long continued acquiescence in a course of conduct by one interested in it, especially when the rights of others are affected thereby, will induce the court to refuse him relief upon his subsequent complaint of it. *Dimpfell* v. *Ohio & Mississippi Railway*, 110 U. S. 209. *Allen* v. *Wilson*, 28 Fed. Rep. 677. *Burt* v. *British Assurance Association*, 4 DeG. & J. 158. *Efooks* v. *South Western Railway*, 1 Sm. & G. 142. *Graham* v. *Birkenhead Railway*, 2 Macn. & G. 146.

As to the alleged improper investments there is no averment that they were fraudulently made, or that the plaintiff objected to them, or that he was ignorant of them. The presumption is, that he knew of them, and did not object; for they all appear upon the books of the corporation, of which he was a director from 1871 to 1879, and the treasurer from 1879 to 1884, and all but the last of them were made as long ago as 1881, and most of them many years before that time. So long as he was a director, or the treasurer, it was his duty to know of all the investments of the company's money, and to object to them and endeavor to prevent them if they were illegal or improper. In view of his official position, and the lack of any averment or intimation that he objected to these investments until the expiration of more than three years after the last was made, and more than thirteen years after the first during his directorship, he can hardly complain if he is held to have so far acquiesced in them as to have lost his right to recover on account of them. If he intended to rely on them as a cause of action, he has certainly been guilty of laches, and for that reason he cannot be heard to

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complain of them at this late day. *Peabody* v. *Flint*, 6 Allen, 52. *Royal Bank of Liverpool* v. *Grand Junction Railroad*, 125 Mass. 490.

These considerations apply also to some of the other matters relied on; especially to the increase of Worthington's salary as president for a term which ended May 15, 1875, to the loan of money obtained from Job E. Worthington in 1874, and to most of the payments of interest upon it. *Demurrer sustained.*

W. G. Russell & G. Putnam, for the defendant.

J. Lowell & E. M. Johnson, for the plaintiff.

GEORGE W. CUMMINGS, executor, *vs.* CHARLES H. CUMMINGS & others.

Suffolk. February 2, 1888. — April 6, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Will — Bequest — Blood Relations — Per Stirpes or Per Capita — Capital and Income.

If a testator gives the income of a residuary fund to his wife during her life, and directs that the principal at her death be divided "equally between my blood relations of the degree which the law permits," the bequest over is to those who are the heirs of the testator at the time of his death, each of several classes taking *per stirpes* and not *per capita*.

A gift by a testator, the net income of whose estate amounts to six thousand dollars, to his wife of "twelve hundred dollars in money, to be paid to her annually in quarterly payments during her life," is payable out of income, and not out of principal.

BILL IN EQUITY, filed April 8, 1887, by the surviving executor of the will of George Cummings, to obtain the instructions of the court as to the payment of the annuity mentioned in the second clause, and the distribution of the residue provided for in the sixteenth clause. The will, omitting the parts merely formal, was as follows:

1. "Imprimis. My will is that all my just debts and funeral charges, and the legacies hereinafter given shall by my executors hereinafter named be paid out of my estate, as soon after my decease as shall by them be found convenient.

2. "Item. I give, devise and bequeath to my beloved wife Abigail Cummings my dwelling house, land and barn in said

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Medfield with all my household furniture, my horses, carriages and harnesses, and my library with all the books and pictures therein. Also, twelve hundred dollars, in money, to be paid to her, annually, in quarterly payments, during her life, by my executors hereinafter named; also, the lot in Mount Auburn Cemetery, which is owned by me together with my brother Daniel Cummings of Boston, Mass. And my will is, that after the decease of my wife my household furniture shall be divided, equally, between her surviving sisters, and that my dwelling-house and my horses, carriages and their harnesses be given to William Chenery and his wife, of said Medfield.

3. "Item. I give to my brother Daniel Cummings of Boston, Mass., five thousand dollars, and to his sons, Charles H. and George W. Cummings, one thousand dollars each.

4. "Item. I give to my executors, in trust, five thousand dollars, of which the income shall be by them paid annually to my sister Mrs. Stephen Smith of Derry, New Hampshire, during her life; the principal thereof to be equally divided, at her decease, between her surviving children. I also give one thousand dollars to each of said children.

5. "Item. I give and bequeath to my sister Mrs. Maria S. Keyes of Lancaster, Mass., the farm on which she now lives, with all the appurtenances thereof during her life. Also I give to her five thousand dollars, of which the income only shall be paid to her, annually, during her life. And it is my will that, at her decease, the principal of the said sum, and the said farm and its appurtenances shall be divided, equally, between her daughters, Hattie A. and Maria A. Keyes. I also give to my executors, in trust, one thousand dollars, of which the income only shall be paid to Sarah Keyes during her life; and at her decease the principal thereof shall be divided, equally, between Hattie A. and Maria A. Keyes. I also give to said Hattie A. and Maria A. and to Charles Keyes one thousand dollars each.

6. "Item. I give to my sister Mrs. Maria S. Keyes of Lancaster, Mass., in trust, one thousand dollars, towards the support of her two grandchildren, the children of her eldest son, W. S. Keyes.

7. "Item. I give to the children, if they be living at my decease, of my late sister Julia Irene Albee of Lancaster, Mass., one thousand dollars each. I also give and bequeath to John

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Albee of said Lancaster, husband of my late sister aforesaid, the use and improvement of the farm on which he now lives, during his life. And it is my will that, at his decease, the said farm be divided equally between his surviving children.

8. "Item. I give to my two nieces, Mrs. Ephraim Avery and Mrs. Emeline Gowing of Lancaster, Mass., one thousand dollars each. And also to the surviving children of my late sister Lydia Thorn one thousand dollars each. I also give and bequeath to Callie Thorn of Clinton, Mass., the house in which she now lives.

9. "Item. I give to Abby Ann and Frederica Lewis, the daughters of Henry P. Lewis, late of Cambridge, Mass., one thousand dollars each. Also to Tabitha R. Simpson of Boston Highlands, Mass., and to Charlotte C. Simpson of Malden Centre, Mass., the use and improvement of the houses and lands which they now occupy, during their lives. And my will is, that, at their decease, the said houses and lands be divided, equally, between their surviving daughters.

10. "Item. I give to the First Baptist Church and Society in Medfield, Mass., four thousand dollars, to be safely invested and only the income thereof to be annually expended towards defraying the expenses of said church and society.

11. "Item. I give to the Union Church in Westford, Mass., my native town, one thousand dollars, in token of my respect for my dear mother, who was a member of that church.

12. "Item. I give to the public library in Medfield, Mass, one thousand dollars, of which the income only shall be expended annually, for the purchase of books to replenish or increase said library. I also give to said library, after the decease of my wife, my portrait, to be placed in a prominent position therein.

13. "Item. I give to the Society in Mass. for the aid of destitute widows of Baptist ministers, one thousand dollars; to the Society for the aid of poor Baptist ministers one thousand dollars; and to the Convention for the support of poor Baptist Churches one thousand dollars.

14. "Item. I direct my executors to cause a suitable monument to be erected in my lot in Mount Auburn Cemetery, at an expense not exceeding one thousand dollars, and to deposit with the trustees of said cemetery corporation a sum not exceeding

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five hundred dollars, — the income only of which sum shall be expended for perpetually keeping the lot in such order as they shall approve or require.

15. "Item. It is my will that my wife shall relinquish her right of dower to all the real estate, which I have herein devised and bequeathed to her and my relatives.

16. "Item. I direct my executors, hereinafter named, to keep safely invested all the rest and residue of my estate after payment of the several legacies herein bequeathed, and of my just debts and funeral charges, and to pay the income thereof to my dear wife during her life, and at her decease to divide the principal thereof equally between my blood relations of the degree which the law permits."

Hearing before *Holmes*, J., who reported the case for the consideration of the full court, in substance as follows. The following facts were admitted. The testator, a business man of large intelligence and ability, died on July 7, 1881. The will, dated February 28, 1880, was drawn up by a clergyman without the assistance or advice of persons learned in the law, and was duly admitted to probate on September 7, 1881. The testator's widow, Abigail Cummings, died on March 10, 1887, leaving a will, which was duly admitted to probate. The widow and her executors had received all the net income of the testator's estate that accrued during her widowhood, and such income amounted to about six thousand dollars per year. No claim for any further payment was ever made by her or on her behalf until after her death, and no part of the principal was ever paid to her, and the provision for her in the second item of the will was sufficient for her comfortable support.

The testator had six brothers and sisters: Daniel Cummings, Angelina Smith, Maria Keyes, Charles Cummings, Julia I. Albee, and Lydia Thorn. The first-named three survived him, and the last-named three died before him, leaving issue surviving him; but all of them died before March 10, 1887, when the testator's widow died.

The heirs of the testator at the date of the will, February 28, 1880, and that of his death, July 7, 1881, according to the statute rules of the descent of real estate, consisted of seventeen persons, made up of the surviving brother and sisters of the testator, and

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of the children of the deceased brother and sisters. The persons who would have been the heirs of the testator if he had died on March 10, 1887, the date of the widow's death, according to the same rules, were thirty-three in number, consisting of the children of Daniel Cummings, Maria Keyes, Charles Cummings, and Lydia Thorn, and the surviving children and the children of deceased children of Angelina Smith and Julia I. Albee. All the survivors of these, the representatives or heirs of those deceased, the executor of the will of Wright S. Keyes, the husband of Maria Keyes, who, surviving her, died on March 21, 1883, and the executors of the testator's widow, were made defendants.

The children of Daniel Cummings and Charles Cummings, and the executor of the will of Wright S. Keyes, contended that the residuary estate of the testator, George Cummings, vested at the time of his death; and that it then vested (subject to deductions to be made therefrom in the administration of his will and estate) in equal sixth parts, *per stirpes*, according to the number of his brothers and sisters, one sixth part in each of the two sisters and brother then surviving, and one sixth part in the issue then living of each of the two sisters and brother deceased; and that the estate now in the hands of the plaintiff, subject to distribution, should be divided in accordance with such vested interests; and in the case of the death since the death of the testator of any such persons seised of such vested interests, the share of the estate now payable on account of such interests should be paid to the executors or administrators of such person dying seised of said interest.

The children of Lydia Thorn contended that the residuary estate of the testator vested at his death; but that it vested equally among the seventeen persons who were his then next of kin, and should now be distributed equally among them *per capita*, as of the time of his death.

The issue of Maria Keyes, Angelina Smith, and Julia I. Albee, contended that the residuary estate of the testator did not vest until the death of the widow of the testator, on March 10, 1887, and that it then vested equally in the nephews and nieces of the testator then surviving, the issue of any deceased nephew or niece taking the parent's share. According to this

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contention the estate would be divided into twenty-six equal parts, one part for each of twenty-three nephews and nieces living on March 10, 1887, and one part for the issue of a deceased nephew and two deceased nieces.

The executors of the will of the widow of the testator contended that twelve hundred dollars annually, in quarterly payments, should have been paid to her out of the principal of the estate independently of the income, and that there is now due to her estate the sum that these payments would have amounted to if paid, but without interest, because the widow had received the interest of the whole estate.

E. Tappan, for the plaintiff, read the papers in the case.

J. B. Warner, for the executors of the widow.

T. P. Proctor, for the children of Daniel Cummings and Charles Cummings, and the executor of Wright S. Keyes.

E. H. Bennett, (*G. R. Wheelock* with him,) for certain issue of Maria Keyes and Angelina Smith.

P. E. Tucker, for the children of Lydia Thorn.

H. C. Hartwell, for the children and grandchildren of Julia I. Albee.

A. F. Butterworth, for a child of Maria Keyes.

KNOWLTON, J. This case presents three questions: First, Is the estate of the residuary legatees to be deemed to have vested in those who were the testator's heirs at the time of his death, or is it to be distributed among those who were his blood relations at the time of the death of his widow? Secondly, Do these legatees take *per stirpes* or *per capita*? Thirdly, Was the annual payment of twelve hundred dollars to the testator's widow, under the second clause of the will, to be made from the income of the estate in the hands of the executors, or from the principal?

It seems very clear that the gift of the residuum was to those who were the testator's blood relations at the time of his death, in accordance with the principle recognized in many cases, that when a bequest is made to one or more for life, and remainder to the testator's heirs, the bequest is to those who are heirs at the time of his decease, unless there are words indicating a clear intention that it shall go to those who may be in that relation at the time of the happening of the contingency upon

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which the estate is to be distributed. *Blanchard* v. *Blanchard*, 1 Allen, 223. *Fay* v. *Sylvester*, 2 Gray, 171. *Pike* v. *Stephenson*, 99 Mass. 188. *Gibbens* v. *Gibbens*, 140 Mass. 102, 105.

The term "blood relations" in the sixteenth clause of the will is equivalent in this case to heirs, and the words "equally between my blood relations of the degree which the law permits" seem to have been used to denote the mode of distribution provided by the statute. The will was not drawn by a lawyer, and the language was not accurately used, but it clearly indicates that the testator had in mind the relative rights of heirs differing in relationship to a deceased person, under the law. The word "equally" in this connection is not inconsistent with this view. The testator probably meant by it, with equal regard to the rights of every one as defined by law. Viewing the whole expression most favorably to those who seek a distribution *per capita*, it was merely equivalent to "equally among my heirs," and where that is the language the division is according to the Statute of Distributions. "A devise to heirs designates, not only the persons who are to take, but also the manner and proportions in which they take." *Rand* v. *Sanger*, 115 Mass. 124. See also *Balcom* v. *Haynes*, 14 Allen, 204; *Holbrook* v. *Harrington*, 16 Gray, 102; *Hall* v. *Hall*, 140 Mass. 267; *Booth* v. *Vicars*, 1 Collyer, 6; *Fielden* v. *Ashworth*, L. R. 20 Eq. 410; *In re Campbell's Trusts*, 33 Ch. D. 98.

There is much in the situation of the testator in reference to the number of his heirs of different classes, and the effect which the opposite construction would have upon the distribution of his estate, and in the manifestation of his intention towards different heirs in other parts of his will, to strengthen this view. We are therefore of opinion that the distribution among the legatees under this clause should be made *per stirpes*, and not *per capita*.

By the second clause of the will the executors were required to pay to the testator's widow twelve hundred dollars annually, in quarterly payments, during her life; and by the sixteenth clause, to keep the residue invested, and pay her the income thereof for the same period. The legacy of twelve hundred dollars annually was an annuity, and the testator contemplated the retention in the hands of the executors of the means of

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paying it. *Swett* v. *Boston*, 18 Pick. 123. *Stephens* v. *Milnor*, 9 C. E. Green, 358. The annual income of the entire fund in their hands under the will was about six thousand dollars, and the question is whether the annuity was payable from the income or the principal. The very nature of an annuity suggests, when those charged with the payment of it have in their hands a fund producing income sufficient to pay it, that the payment should be made from the income, and not from the principal. In this case the payments were to be made quarterly, and the income regularly accruing would naturally be expected to be used for them, rather than sums deducted from the fund. It has been expressly held, that, where a testator gives an annuity without stating from what source it is to be paid, and then divides the rest of his estate among several persons, it is the duty of the executors before distributing the capital, either to appropriate a sufficient amount of the capital to purchase an annuity, or to reserve enough of it to yield an income amply sufficient to meet the annuity, leaving such portion of the capital to be the subject of another distribution when the annuity has ceased. *Treadwell* v. *Cordis*, 5 Gray, 341. See also *Wroughton* v. *Colquhoun*, 1 DeG. & Sm. 36; *Richardson* v. *Hall*, 124 Mass. 228.

That rule applied to the present case would have left the widow, under the sixteenth clause of the will, only that portion of the entire income which remained after deducting sufficient to pay her annuity of twelve hundred dollars under the second clause. Her executors, therefore, are not entitled to the amount which they now claim.

Decree accordingly.

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COMMONWEALTH *vs.* CERTAIN INTOXICATING LIQUORS, ZEPHRIN LUCIA, claimant.

Middlesex. February 3, 1888. — April 6, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, & KNOWLTON, JJ.

Intoxicating Liquors — Complaint — Search-warrant — Description — Notice — Service.

A complaint on the Pub. Sts. c. 100, § 30, averred that intoxicating liquors were kept by a certain person in a "hotel and barn" on the north side of a street in H., "known as the Valley House and barn in the rear thereof, next east of the bakery building, occupied in part by" a third person. The search-warrant recited in substance the averment of the complaint. *Held*, that the complaint and warrant sufficiently described the building to be searched so as to identify it.

The notice required by the Pub. Sts. c. 100, §§ 34, 35, was addressed to the person complained against as "of H.," and described the liquors as "seized in a certain building" occupied by him in "said H." A warrant directed the officer to serve this notice by posting a copy on the barn, and his return thereon recited that he posted such a copy on the barn "in the rear of the hotel," "next east of the bakery building occupied in part" by such third person, "being the same building in which the liquors" were seized. The person complained against appeared as a claimant of the liquors. *Held*, that the notice and the service thereof were sufficient.

COMPLAINT on the Pub. Sts. c. 100, § 30, to James T. Joslin, a trial justice for the county of Middlesex, alleging that, on August 29, 1887, certain intoxicating liquors were "kept and deposited by Zephrin Lucia of said Hudson, in a certain hotel and barn situate on the north side of Main Street, in Hudson Centre, known as the Valley House and barn in the rear thereof, next east of the Bakery Building, occupied in part by Geo. W. Davis, in said Hudson, and occupied by said Zephrin Lucia as a hotel and barn, having a place of common resort kept therein," for sale contrary to law. The warrant issued upon this complaint set forth that the liquors were "kept and deposited by Zephrin Lucia of said Hudson, in a certain hotel and barn situate on the north side of Main Street, in Hudson Centre, next east of the Bakery Building, so called, known as the Valley House and barn in the rear thereof, said Bakery Building occupied in part by Geo. W. Davis in said Hudson and occupied by

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paying it. *Swett* v. *Boston*, 18 Pick. 123. *Stephens* v. *Milnor*, 9 C. E. Green, 358. The annual income of the entire fund in their hands under the will was about six thousand dollars, and the question is whether the annuity was payable from the income or the principal. The very nature of an annuity suggests, when those charged with the payment of it have in their hands a fund producing income sufficient to pay it, that the payment should be made from the income, and not from the principal. In this case the payments were to be made quarterly, and the income regularly accruing would naturally be expected to be used for them, rather than sums deducted from the fund. It has been expressly held, that, where a testator gives an annuity without stating from what source it is to be paid, and then divides the rest of his estate among several persons, it is the duty of the executors before distributing the capital, either to appropriate a sufficient amount of the capital to purchase an annuity, or to reserve enough of it to yield an income amply sufficient to meet the annuity, leaving such portion of the capital to be the subject of another distribution when the annuity has ceased. *Treadwell* v. *Cordis*, 5 Gray, 341. See also *Wroughton* v. *Colquhoun*, 1 DeG. & Sm. 36; *Richardson* v. *Hall*, 124 Mass. 228.

That rule applied to the present case would have left the widow, under the sixteenth clause of the will, only that portion of the entire income which remained after deducting sufficient to pay her annuity of twelve hundred dollars under the second clause. Her executors, therefore, are not entitled to the amount which they now claim.

Decree accordingly.

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COMMONWEALTH vs. CERTAIN INTOXICATING LIQUORS.
ZEPHRIN LOUIS.

Middlesex. February 1, — April 1, —

Present: MORTON, C. J., DEVENS, & KNOWLTON, JJ.

Intoxicating Liquors — Complaint — Search Warrant — Description — Notice — Service.

A complaint on the Pub. Sts. c. 101, § 31, averred that a certain building kept by a certain person in a "store and bakery" at a place described as H., "known as the Valley House and also as the Bakery building, occupied in part by" a certain person, "as aforesaid," recited in substance the statement of the complaint for the search warrant, and warrant sufficiently described the building to identify it.

The notice required by the Pub. Sts. c. 101, § 32, was addressed to "the person complained against as of H." and described the premises as "the building" occupied by him in "said H." It appeared that the officer made this notice by posting a copy on the door of the store and bakery, and that he posted such a copy on the door of the room in the rear of the bakery building occupied in part by the person complained against as the building in which the liquors were seized. The person complained against appeared as a claimant of the liquors. *Held*, that the notice was sufficient.

COMPLAINT on the Pub. Sts. c. 101, § 31, filed in the trial justice for the county of Middlesex, August 29, 1887, certain intoxicating liquors deposited by Zephrin Louis of said Hudson in a building and barn situate on the north side of the Centre, known as the Valley House, next east of the Bakery building occupied by Davis, in said Hudson, and used as a hotel and barn, having [illegible] for sale contrary to law. The complaint set forth that the [illegible] Zephrin [illegible]

[illegible] persons interested in the [illegible] that the notice was prop-

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said Zephrin Lucia as a hotel and barn, having a place of common resort kept therein," for sale contrary to law.

Certain liquors were seized on the warrant, and a warrant to serve notice was issued, which directed the officer "to serve the annexed notice, by delivering an attested copy thereof into the hands of Zephrin Lucia of Hudson, in the county of Middlesex, or by leaving an attested copy thereof at his usual place of abode, and also by posting up another attested copy thereof on the barn in the rear of the Valley House, so called, in the centre of Hudson, on the north side of Main Street, and being the building next east of the Bakery Building, occupied in part by Geo. W. Davis, said barn being on the premises of said Lucia, and the same being the building in which the intoxicating liquors described in said notice were seized."

The notice annexed to this warrant was addressed to Zephrin Lucia, and recited that the liquors had been "seized in a certain building occupied by the said Zephrin Lucia in said Hudson," and the return of the officer upon the warrant set forth that he had served the notice, by giving in hand an attested copy thereof to "Zephrin Lucia, and on the same day posted a like attested copy thereof on the barn in rear of Valley House of said Zephrin Lucia, in the rear of the hotel of said Lucia, on the north side of Main Street, in the centre of said Hudson, next east of the Bakery Building occupied in part by Geo. W. Davis, in said Hudson, being the same building in which the liquors, and vessels containing the same, described in said precept, were seized."

In the Superior Court, on appeal, Lucia, who appeared as claimant, renewed a motion which was made before and overruled by the trial justice, to quash the complaint for the reasons that "there is no sufficient, certain or definite description in said complaint and warrant of the buildings or place wherein intoxicating liquor is alleged to be illegally kept for sale"; that "said place or buildings are alleged to be occupied in part by George W. Davis, a person other than the one who is alleged to do the illegal keeping, and the warrant as prayed for and granted authorizes a search of the premises of both"; that "the description of said buildings and place is not the same in said complaint and warrant, but different places are described in

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each"; that "the allegations in said complaint and warrant as to the place or building in which said liquors were kept, and as to the illegal keeping, are uncertain, insufficient, and ambiguous"; and that "the notice is insufficient in form, and the service thereof is bad." The motion was overruled; the liquors were adjudged to be forfeited; and the claimant appealed to this court.

J. W. Corcoran, for the claimant.

A. J. Waterman, Attorney General, for the Commonwealth.

KNOWLTON, J. The questions of law in this case arise upon the claimant's motion to quash. It is contended that in the complaint, and also in the warrant, the description of the buildings or place wherein the intoxicating liquor was alleged to be kept was fatally defective.

By the Pub. Sts. c. 100, § 32, it is provided that the complaint and warrant in cases of this kind shall "particularly designate so as to identify the building, structure, and place to be searched." The language of the complaint, properly construed, called for a hotel and barn in the town of Hudson, occupied by Zephrin Lucia, known as the Valley House and barn in the rear thereof, situated on the north side of Main Street in Hudson Centre, next east of the bakery, which was occupied in part by George W. Davis. The allegations of the warrant in relation to the buildings, with slightly changed phraseology, were the same in substance as those of the complaint. Nothing appears to indicate that this description was not strictly accurate, and the fair inference from the record is that it perfectly identified the place to be searched. The objection to the complaint is that its grammatical construction was doubtful, and that it was ambiguous. While its language was involved, and not perspicuous, we think it had no such ambiguity as to prevent identification of the buildings and place referred to. *Commonwealth* v. *Intoxicating Liquors*, 97 Mass. 63. *Commonwealth* v. *Intoxicating Liquors*, 107 Mass. 386. *Commonwealth* v. *Intoxicating Liquors*, 109 Mass. 371, 372. *Commonwealth* v. *Intoxicating Liquors*, 113 Mass. 208. *Commonwealth* v. *Intoxicating Liquors*, 122 Mass. 36.

The warrant to serve notice to persons interested in the liquors, and the return upon it, show that the notice was prop-

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erly served. The description in the notice of the place where the liquors were seized was not so definite as is desirable. But it does not appear that the claimant occupied any other building in Hudson than the hotel and barn, which were together upon the same premises, and we cannot say, as matter of law, that, as applied to the facts of this case, the notice was insufficient. Besides, it is enough as against the claimant, although not as to others, that, having had actual notice, he appeared in the case generally, and presented his claim. *Commonwealth* v. *Intoxicating Liquors*, 97 Mass. 601, 602. *Commonwealth* v. *Intoxicating Liquors*, 110 Mass. 182, 187. The motion to quash was rightly overruled. *Judgment affirmed.*

COMMONWEALTH *vs.* JOHN V. SCHAFFNER.

Suffolk. February 3, 1888. — April 6, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, & KNOWLTON, JJ.

Milk — Indictment — Motion to Quash — Evidence — Election — Witness — Credibility — Impeachment.

A motion to quash an indictment because it "sets forth no crime or offence known to the law," made after the impanelling of the jury, is filed too late; nor does it assign "specifically the objection relied on," within the Pub. Sts. c. 214, § 25.

An indictment on the St. of 1886, c. 318, § 2, alleging that the defendant had in his "possession milk to which a certain foreign substance had been added, to wit, annatto coloring matter," with intent unlawfully to sell the same, is sufficient without naming the quantity.

Evidence offered at the trial of such an indictment as to two samples of milk, taken from the defendant's possession at substantially the same time, is competent, and the government cannot be required at the time of the offer, if ever, to elect which sample it will rely on.

The addition of the annatto coloring matter, whether injurious to health or not, is punishable under the statute.

Evidence that the "milk was of low grade" is competent, although it may tend to prove another offence.

If a chemist, called as an expert by the defendant, identifies a letter written by him nearly three years before to a third person in relation to another matter, but assumed at the trial to contain a suggestion derogatory to his character, the letter is not admissible to impeach his credit.

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INDICTMENT on the St. of 1886, c. 318, § 2, alleging that "the jurors for the Commonwealth of Massachusetts, on their oath present, that John V. Schaffner, of Boston aforesaid, on the fifteenth day of May, in the year of our Lord one thousand eight hundred and eighty-seven, at Boston aforesaid, unlawfully did have in his possession milk to which a certain foreign substance had been added, to wit, annatto coloring matter, a further description of which said jurors cannot give, with intent then and there unlawfully to sell the said milk within this Commonwealth."

In the Superior Court, after the jury was impanelled and sworn, the defendant moved to quash the indictment for the following reasons: "1. The indictment sets forth and describes no crime or offence known to the law. 2. A complaint for the same cause, and founded on the same identical facts, was sworn out against this defendant, and has been disposed of in this court." *Bacon*, J., overruled the motion.

At the trial, it appeared that two samples of milk were taken from the defendant's wagon, on the same day, and substantially at the same time. The defendant requested the judge to require the government to elect as to which sample it should rely upon; but the judge refused to comply with this request, and admitted evidence as to both samples, against the defendant's objection.

A milk inspector, called by the government, who testified that, upon testing the milk, he found it to contain some annatto coloring matter, was asked, on cross-examination, whether the quantity found would be injurious to health, but, upon objection by the government, was not permitted to answer. A chemist, called by the government, testified that he had analyzed both the samples taken to ascertain the standard quality of the milk, and was asked to state what he found the quality of the milk to be, and replied, under the defendant's objection, that "the milk was of a low grade."

One Bowker, called by the defendant as an expert, was asked, on cross-examination, if he wrote a certain letter, to which he replied in the affirmative. To impeach the testimony of this witness the government was permitted to introduce in evidence, against the defendant's objection, a letter, addressed by the

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witness to one Tarbell, in relation to the coloring of vinegar, which was as follows: "Office of Dr. H. L. Bowker & Co., Manufacturing Chemists, 295 and 297 Franklin Street. Dr. H. L. Bowker, State Assayer for Massachusetts. Boston, July 17, 1884. Mr. E. Tarbell: Dear Sir, — Your vinegar tests am't $4\frac{47}{100}$ per cent of acetic acid, or 30 grains soda test. The new law requires 5 per cent, and nothing short. You can use a little of our vinegar acid, and fetch it up at small expense. Yours, H. L. Bowker & Co."

After the evidence was all in, the defendant asked the judge to rule that the indictment was not sufficient to warrant a verdict of guilty, because it did not describe or set forth any crime or offence known to the law; but the judge ruled that it was sufficient, and so instructed the jury. The jury returned a verdict of guilty, and the defendant alleged exceptions.

J. A. McGeough, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

C. ALLEN, J. 1. The motion to quash was filed too late, so far as any informalities in the indictment are concerned; nor does it set forth specifically the objections relied on in the first cause assigned. Pub. Sts. c. 214, § 25. *Commonwealth* v. *Fitchburg Railroad*, 126 Mass. 472. *Commonwealth* v. *Murray*, 135 Mass. 530. The second cause assigned in the motion to quash was not relied on in the argument.

2. The objection that, apart from mere informality, the indictment does not set forth an offence known to the law, cannot be sustained. The St. of 1886, c. 318, § 2, includes as an offence, and makes punishable, the having in possession, with intent to sell, milk to which water or any foreign substance has been added. The indictment follows this language. It was not necessary to allege the quantity; *Commonwealth* v. *Conant*, 6 Gray, 482; and if it were, the objection on this ground would be merely formal, and came too late, and was not specifically set forth.

3. It was clearly competent for the court to admit evidence as to both samples, and it was not necessary at that stage of the case, if ever, to require the government to elect which sample it would rely on. *Commonwealth* v. *Bennett*, 118 Mass. 443. *Commonwealth* v. *Pratt*, 137 Mass. 98.

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4. It was immaterial whether the addition of the annatto coloring matter was or was not injurious to health. The addition of pure water is punishable under the statute.

5. It was competent for the chemist to testify that the milk was of low grade. Testimony having been introduced to show that a particular foreign substance had been added, it was proper to show just what the milk was, independently of that. The defendant contends that, as it is a separate offence under the St. of 1886, c. 318, § 2, to have in possession, with intent to sell the same, "milk not of good standard quality," this testimony must have tended to prejudice the jury, and was on that account inadmissible. But all evidence relevant and material to prove the offence which is charged is competent, though it may also show the commission of another offence. *Commonwealth* v. *Choate*, 105 Mass. 451, 457, 458. *Commonwealth* v. *Scott*, 123 Mass. 222, 235.*

6. The admission of the letter of the witness Bowker was erroneous. We are aware that in England and in some of the United States this latitude of cross-examination has sometimes been allowed; though not without protests that the practice ought to be restricted. Taylor, Ev. §§ 1459–1461. *People* v. *Irving*, 95 N. Y. 541. Stephen, Ev. (Chase's Am. ed.) 225, 277. 1 Whart. Ev. §§ 541, 542. In Massachusetts, the rule has been that a witness cannot be asked on cross-examination, in order to affect his credibility, about his part in transactions irrelevant to the issue on trial. *Holbrook* v. *Dow*, 12 Gray, 357. *Smith* v. *Castles*, 1 Gray, 108, 112. *Commonwealth* v. *Shaw*, 4 Cush. 593. See also *Commonwealth* v. *Quin*, 5 Gray, 478; *Commonwealth* v. *Mason*, 105 Mass. 163, 168. The case of *Commonwealth* v. *Hersey*, 2 Allen, 173, which is apparently in favor of a larger liberty, was not so in reality. The case is too briefly reported on this point. The indictment was for poisoning by strychnine a woman who was pregnant with child, under pretence that it would produce a miscarriage. A reference to the full report of the trial (Trial of Hersey, 122–126) shows that the witness Morrill, called by the government, testified in his direct examination, that he was practising medicine in Boston, though not

* See also *Commonwealth* v. *Robinson*, *post*, p. 571.

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regularly educated as a physician; that the prisoner came to his office twice, at times near enough to the time of the alleged poisoning to be relevant and material, and said he had been looking over the newspapers and had seen Morrill's advertisements of medicines for females; that conversation then ensued in respect to medicines and operations for procuring abortion, and the prices and danger thereof; after which the prisoner, at the last interview, asked if Morrill would sell him some strychnine. On cross-examination, the witness admitted certain medical advertisements, published in Boston newspapers, which were shown to him, to be his; and the advertisements were allowed to be read to the jury, for the purpose of showing the nature of his medical practice, and affecting his credit; and the report of the trial adds, to show "that the statements there made and the testimony of the witness were contradictory." Even if not directly contradictory, the advertisements were properly admitted in explanation of his habits, occupation, and way of life, and in illustration of his character, especially in view of his testimony in chief. *Hathaway* v. *Crocker*, 7 Met. 262, 266.

In the present case, the letter of Bowker was written nearly three years before the matters testified to by him, and had no relation thereto. It appears to have been assumed on all hands, at the trial, that the suggestion made in the letter was derogatory to his character. The course of the trial afforded him no opportunity to object, or to explain it. It might be, that the proper effect of the letter could only be determined by further evidence, to show whether his suggestion in the letter would or would not be dishonest or discreditable. The letter was admitted in order to impeach his testimony, and it may have had that effect with the jury. The case thus falls within the rule which has prevailed in this Commonwealth, and we are satisfied that both witnesses and parties ought to be protected from being obliged to encounter such collateral charges. For this reason only, the entry must be,

Exceptions sustained.

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JOSEPHINE MARTIN & others *vs.* ANN MARTIN.

Suffolk. March 3, 1888. — April 6, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Mortgage — Assignment — Redemption — Interest — Married Woman — Husband — Tenant by the Curtesy.

A married woman, who is the assignee of a mortgage given by her husband's former wife, is entitled to interest on the debt while he is in possession of the mortgaged premises as tenant by the curtesy.

BILL IN EQUITY, filed August 19, 1887, to redeem land from a mortgage. Hearing before *Devens*, J., who reserved the case, on the bill, answer, and agreed facts, for the consideration of the full court. The case was submitted on briefs to all the judges. The facts appear in the opinion.

R. W. Light, for the plaintiffs.

J. M. B. Churchill, for the defendant.

KNOWLTON, J. The defendant is the assignee of a mortgage of real estate, given on June 1, 1873, to secure payment of eleven hundred dollars and interest thereon at seven per cent per annum, and has been in possession of the mortgaged premises since June 20, 1887, receiving the rents and profits thereof. A balance of four hundred dollars of the principal remains due, and no interest has been paid since the assignment to the defendant, on April 15, 1881. The plaintiffs bring their bill to redeem, and contend that the defendant is not entitled to interest, because her husband, to whom she was married a short time before taking the assignment, and who died on April 28, 1887, was formerly the husband of the mortgagor, and joined in the mortgage for the purpose of releasing his right as tenant by the curtesy initiate, and after the death of his former wife was in possession of the mortgaged property as tenant by the curtesy until his death.

He had no relation to the mortgage except through his right in the mortgaged estate. He was not legally liable upon the debt secured, and as between himself and his wife, the assignee

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of the mortgage, he was under no obligation to pay it or the interest upon it. In principle this case is precisely like *Bemis* v. *Call*, 10 Allen, 512, in which it appeared that a married woman mortgaged her separate real estate to secure her husband's debt, and after his death married another man, who took an assignment of the mortgage, and held it for several years until his death. It was decided that his administrator could enforce it against her for the benefit of his estate. See also *Cormerais* v. *Wesselhoeft*, 114 Mass. 550; *Tucker* v. *Fenno*, 110 Mass. 311. *Bemis* v. *Call* is decisive of this; in neither of them was the mortgage debt to be paid by the husband or wife of the person holding the mortgage; and in neither of them is there any conflict with the doctrine stated in *Chapman* v. *Kellogg*, 102 Mass. 246, and *Abbott* v. *Winchester*, 105 Mass. 115, to the effect that the union of two persons in marriage extinguishes all debts which either owes the other, and that the purchase by either of a note against the other deprives it of validity, so that it cannot be collected if subsequently sold to another person. But since these two cases were decided, the Sts. of 1871, c. 312, and 1874, c. 184, have been enacted, (see Pub. Sts. c. 147, §§ 1–7,) and a more liberal and equitable rule has been adopted, which is in harmony with modern legislation; and it is now settled in this Commonwealth, that the purchase by a husband of a mortgage given by his wife to secure her note does not invalidate the security, but merely suspends the right to enforce it. *Butler* v. *Ives*, 139 Mass. 202. *Model Lodging House Association* v. *Boston*, 114 Mass. 133.

The plaintiffs concede that the defendant is entitled to the principal of the mortgage debt, but contend that the interest should have been paid by the life tenant of the property, who was her husband, and that she has lost her security for that part of her claim. But the law recognizes no such distinction between principal and interest. Payment of the interest as well as of the principal was secured by the contract. *Brannon* v. *Hursell*, 112 Mass. 63. *Quinby* v. *Cook*, 10 Allen, 32. And the fact that her husband was in possession of the mortgaged estate as tenant by the curtesy put upon him, no obligation to her, legal or equitable, in reference to the interest upon the mortgage debt. As between him and the plaintiffs, who owned the

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remainder after the termination of his life estate, it was his duty to pay the interest and keep down the incumbrance. But that was a duty which did not relate to her, and of which, if she had not been his wife, she could have taken no advantage. *Plympton* v. *Boston Dispensary*, 106 Mass. 544. *In re Morley*, L. R. 8 Eq. 594.

By redeeming the mortgage, the plaintiffs might at any time have put themselves in a position to enforce payment of interest by the life tenant, and to save themselves from risk of loss by his neglect. Upon the facts as now presented, they are entitled to redeem by paying the defendant $400, and interest thereon at seven per cent from April 15, 1881, less such deductions as should be made on account of her receipt of rents and profits.

Decree accordingly.

ELLEN M. CLAPP *vs.* MASSACHUSETTS BENEFIT ASSOCIATION.

Suffolk. January 16, 1888. — April 7, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Beneficiary Association — Certificate — Warranty or Representation — Evidence — Burden of Proof — Exceptions.

A certificate of benefit insurance was issued on condition that the statements of the application, which were made a part of the contract, were "in all respects true," and an acknowledgment at the end of the application recited that the applicant does "hereby warrant each of the foregoing statements to be true, to the best of my knowledge and belief, and that I have not" concealed any material information, agreeing that any "untrue or fraudulent statements" made by or for him should forfeit the insurance. *Held*, that the words "best knowledge and belief" qualified the words "untrue and fraudulent statements" as well as the word "true."

The burden of proving a representation upon which the certificate was based untrue, to the best of the applicant's knowledge and belief, is upon the beneficiary association.

At the trial of an action on the certificate there was much evidence that material statements of the applicant were not in fact correct, and the defendant association presented its case on the theory that it was entitled to a verdict if any such statement was shown to be untrue, alleging exceptions to a refusal of the

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presiding judge so to rule. *Held*, that the question whether the evidence that a statement was false, and that the applicant knew or believed it to be so, was so conclusive as matter of law as to so entitle the association to a verdict, was not open upon the exceptions.

CONTRACT to recover $3,000 on a certificate of membership in the defendant association, issued to Edward A. Clapp for the benefit of his wife, Ellen M. Clapp. Trial in the Superior Court, before *Bacon*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff introduced in evidence the proofs of the death of Clapp, by which it appeared that he died on February 3, 1886, of Bright's disease, and the certificate, which was dated February 1, 1885, and contained the following condition: "The statements and declarations made by and on behalf of said member in his application to become a benefit member of said association, which are hereby referred to as the basis of this contract, and are a part thereof, and on the faith of which this certificate is issued, are in all respects true, and that no fact has been suppressed relating to his health or circumstances affecting the interests of said association, or their inducement to accept the risk."

The defendant introduced in evidence the application upon which the certificate was issued, and which contained the following questions and answers: Question 10. "Have you had, since childhood, ... disease of the urinary organs?" Answer. "No." Q. 11. "What sickness, disease, or injury have you ever had?" A. "Rupture." Q. 12. "How long since you were under the care of a physician, and for what cause?" A. "About two years ago. Inflammation of bowels." Q. 13. "Have you now any disorder, infirmity, or weakness?" A. "No." Q. 17. "Has any proposal or application to insure your life ever been made to any company or agent upon which a policy has not been issued? If so, state full particulars." A. "No." Q. 18. "Name and residence of your usual medical attendant?" A. "Dr. Wesselhoeft, Cambridge, Mass."

The application bore at the end thereof the following acknowledgment subscribed by Clapp: "I, Edward A. Clapp, of West Manchester, county of Essex, State of Massachusetts, do hereby warrant each and all the foregoing particulars and statements to be true, to the best of my knowledge and belief, and that I

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have not, in this application for above-named contract, concealed or withheld any material circumstance or information concerning the past or present state of my health or habits of life; and I do hereby acknowledge, consent, and agree that any untrue or fraudulent statement made above, by me or any one else, or to any medical examiner of said Massachusetts Benefit Association, or any concealment of facts, by me or any one else, may forfeit and cancel all rights to any benefit under the above-named contract. Dated at Boston, State of Massachusetts, this 13th day of February, 1885. Edward A. Clapp, Applicant. Witness: S. T. Elliot."

Benjamin F. Dyer, secretary of the New England Mutual Aid Society, called by the defendant, testified that on December 18, 1883, Clapp made an application for additional insurance on his life in that society; that the application was declined, and that fact was communicated by him to Clapp; that Clapp was advised to communicate with his attending physician; that Clapp insisted on knowing what the difficulty was, and was informed; that he told Clapp "that the analysis of the urine was unsatisfactory"; that he had conversations with Clapp at several different times; and that Clapp said he had seen his physician, thought that we had been too particular in declining his application, that there was no real difficulty, that it was something that was only temporary, and that he would soon recover from the difficulty." On cross-examination, he said that he thought he had not given Clapp any written notice that his application had been declined; that he did not tell him that the application was declined because they did not wish to increase the risk, but his recollection was that he informed him that they would not accept him for an additional sum for the reason that his application was unsatisfactory; that after he had told him that he declined to take the additional insurance Clapp came in and discussed the question a half-dozen times, and that their conversations were within three or four months after the examination was made; that he did not know that he ever showed Clapp the indorsement upon his application, "Declined," but his impression was that the application was before them; that Clapp's object in the conversations appeared to be to convince the doctor and himself that some mistake had been made in regard to the analysis of the urine; and that Clapp was a man of cheerful, sanguine temperament,

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of robust frame, in the prime of life, and to all appearance a well man.

Dr. J. A. Follett, the medical examiner of the New England Mutual Aid Society, called by the defendant, testified, that upon examining Clapp he refused to pass him or recommend him as a safe risk, basing his decision upon a single examination of the urine, in which he found a very large amount of albumen; that he told him that the application was declined because of the presence of albumen in the urine; that Clapp wished to know what that meant; that in quite an extended conversation he told Clapp that it was what was commonly called Bright's disease; that he told him that he preferred not to use the words "Bright's disease," because those words covered sundry different conditions, but preferred to call it, and so called it, "albumen in the urine, or chronic nephritis, or acute nephritis"; that Clapp wished to know if it was a curable disease; that he told him that he did not think it was curable, although patients having it sometimes apparently had recovered; that he saw Clapp at least three times, and thought it was seven or eight; and that at one of their interviews Clapp told him that he had consulted Dr. Morrill Wyman, who did not discourage him quite so much as he did.

Dr. Morrill Wyman, called by the defendant, testified, that Clapp first came to see him in the latter part of December, 1883, and that after that he attended him at his house for a nervous affection, with convulsive movements; that he did not think he made up his mind to what to attribute it; that he examined the urine, and found a certain amount of albumen; that he continued to treat Clapp, who continued in a somewhat similar condition until May or June, 1884; that he did not know that the nervous condition to which he referred was due to the condition of the urine. On cross-examination, he said that in February, 1884, Clapp had a severe illness, which confined him to his house for six weeks; that he was his attending physician during that illness; that he first began to treat him as a patient some time in December, 1883, and continued to do so until March 23, 1885; that he treated him for a nervous affection, with convulsive movements, in February, 1884; that he found albumen to a certain extent in Clapp's urine, his last examination being made on March 23, 1885; that he made a careful examination of the urine

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a good many times; that it would have been rash in any physician to say that he had Bright's disease; and that a physician could safely say that he had symptoms pointing towards Bright's disease.

The plaintiff testified that her husband had some disease of the kidneys, for which he was treated by Dr. Wyman, in the early part of 1884, and that he was attended by Dr. Wesselhoeft at some time in 1883, before he was attended by Dr. Wyman, but not afterwards.

After the evidence was in, the defendant requested the judge to rule that on the whole evidence the plaintiff could not recover, and that a verdict should be returned for the defendant.

The judge refused so to rule, and the defendant requested the following rulings:

"1. That each one of the questions in the application of Clapp, the deceased member, was made material to the risk assumed by the defendant association, and if any one of the answers was untrue, from design or otherwise, the plaintiff cannot recover in this action, and the verdict should be for the defendant.

"2. If Edward A. Clapp, the deceased, at any time before February 13, 1885, had any disease of the urinary organs, then his answer to the tenth question was untrue, and the plaintiff cannot recover, but the verdict must be for the defendant.

"3. If the said Clapp, before February 13, 1885, had any sickness, disease, or injury other than rupture, then his answer to the eleventh question was untrue, and the verdict should be for the defendant.

"4. If at any time after July, 1883, said Clapp was under the care of a physician for any cause other than inflammation of the bowels, then his answer to the twelfth question was untrue, and the verdict should be for the defendant.

"5. If at the time said Clapp made his answers to the questions contained in the application made by him to the defendant association he had any disorder, infirmity, or weakness, then his answer to the thirteenth question was untrue, and the verdict must be for the defendant.

"6. That as it appeared by uncontradicted evidence that said Clapp made a proposal or application for insurance on his life to the New England Mutual Aid Society, in December, 1883,

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upon which proposal or application a policy was not issued, his answer to the seventeenth question was untrue, and therefore a verdict must be rendered for the defendant.

"7. That the representations and agreements contained in the application were a part of the contract of insurance, and were warranties, and, inasmuch as those relating to the sickness of Edward A. Clapp, and his condition of health, and his employment of a physician, were untrue, the plaintiff cannot recover."

The judge refused so to rule, and instructed the jury as follows:

"The only thing that is in dispute is whether or not the deceased acted in good faith in making his answers to the questions that were contained in the application, because, if in his answers to the questions in the application he did not state the thing truly, and intentionally did not state it truly, then the present plaintiff cannot recover in this case if he did not state it truly to his best knowledge and belief.

"The application here contains this clause: 'I, Edward A. Clapp, of West Manchester, county of Essex, State of Massachusetts, do hereby warrant each and all the foregoing particulars and statements to be true, to the best of my knowledge and belief.' And that is the extent to which he can be held. He must make his statements truly, according to his best knowledge and belief. If he stated anything in these answers which was not true, and which he knew or had reason to believe was not true, if he did not make his answers in good faith to any of these questions, then that will be a defence to this action. It also adds, 'and that I have not, in this application for above-named contract, concealed or withheld any material circumstance or information concerning the past or present state of my health or habits of life, and I hereby acknowledge, consent, and agree that any untrue or fraudulent statement made above, by me or any one else, or to any medical examiner of said Massachusetts Benefit Association, or any concealment of facts, by me or any one else, may forfeit and cancel all rights to any benefit under the above-named contract.' He does not use the same language in connection with this clause that is used in the preceding clause, but I say that in law that

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language is applicable to the sentence that follows. He says that all the foregoing particulars and statements are true, to his best knowledge and belief, and what is added is to be qualified by the qualification here given in the first place, that it is to his best knowledge and belief. What is added is, 'and that I have not, in this application for the above-named contract, concealed or withheld any material circumstances or information concerning the past or present state of my health or habits of life, and I do hereby acknowledge, consent, and agree that any untrue or fraudulent statement made above by me,' that is, any untrue or fraudulent statement made with the knowledge of the fact that he is making an untrue statement, or knowledge of the fact that he is making a fraudulent statement; and it applies throughout. So that I shall instruct you, that in order to maintain this defence to this action, it is necessary for the defendant to prove that the deceased did not state, to the best of his knowledge and belief, some fact which he did state, and that he did not do the other things provided in this same certificate where the terms are used, to his best knowledge and belief; and it is for you to say whether he did or did not.

"Now, the question arises here as to the burden of proof. Ordinarily, the rule is, in all cases where fraud is alleged, that it must be proved by the party alleging it. A defendant coming into court and alleging that a plaintiff has committed a fraud, is bound to prove it, and the burden of proof is upon him to prove that fraud. A defendant coming into court and alleging that the plaintiff did not make his answers truly, in this case, according to his best knowledge and belief, is bound to show that fact, and to satisfy you of it by a fair and reasonable preponderance of the evidence; and if he does not do it, if he does not satisfy you that he made these statements contrary to his best knowledge and belief and not as he alleges, then, so far as this part of the defence is concerned, you should find for the plaintiff. The burden is on the defendant to prove what he alleges is a fraud, and what he alleges is an untrue statement contained in this application, and if he does not prove it, if he does not convince your minds by a fair preponderance of the evidence, then the plaintiff would be entitled to a verdict. Now, the several questions and answers which have been relied upon

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by the defendant in this case are the tenth, eleventh, twelfth, thirteenth, and seventeenth. . . . .

"It is for you to say whether the deceased did answer these questions according to his best knowledge and belief. . . . . If you are satisfied that these questions were answered in good faith, without any intention to defraud the company or to commit any fraud on the rights of the company or the association, if you are not satisfied that the deceased failed to state these facts in his answers according to his best knowledge and belief, you will render a verdict for the plaintiff, because the burden is on the defendant to show you, by a fair and reasonable preponderance of the evidence, that he did not so answer, and if he does not show you that, the presumption is that he did answer according to his best knowledge and belief, and you have a right to decide the case on the evidence."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions. The case was argued at the bar in January, 1888, and afterwards submitted on the briefs to all the judges.

E. Avery & A. E. Avery, for the defendant.

I. The questions and answers contained in the application, which by the terms of the condition set forth in the certificate enter into and form a part of the contract itself, are warranties. *Daniels* v. *Hudson River Ins. Co.* 12 Cush. 416, 423. *Miles* v. *Connecticut Ins. Co.* 3 Gray, 580. A warranty, in insurance, enters into and forms a part of the contract itself. It defines by way of particular stipulation, description, condition, or otherwise, the precise limits of the obligation which the insurers undertake to assume. *Campbell* v. *New England Ins. Co.* 98 Mass. 381, 389. *McCoy* v. *Metropolitan Ins. Co.* 133 Mass. 82.

II. If the application does not form a part of the contract itself, and the answers to the questions contained therein are not warranties, to be strictly and literally true, but are mere representations, as to which substantial truth in everything material to the risk is all that is required of the applicant, (*Phœnix Ins. Co.* v. *Raddin*, 120 U. S. 183, 189,) the questions and answers contained in this application were material to the insurers to enable them to estimate the risk to be assumed; and if the answers in any respect were materially untrue, they avoided the policy, even if they were made ignorantly and in good faith.

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The judge erred in refusing to give the first, second, third, fourth, fifth, and sixth requests for rulings asked for. *Curry* v. *Commonwealth Ins. Co.* 10 Pick. 535. *Wilbur* v. *Bowditch Ins. Co.* 10 Cush. 446. *Kimball* v. *Ætna Ins. Co.* 9 Allen, 540. *Towne* v. *Fitchburg Ins. Co.* 7 Allen, 51. *Davenport* v. *New England Ins. Co.* 6 Cush. 340, 341. *Miles* v. *Connecticut Ins. Co.* 3 Gray, 580. *Vose* v. *Eagle Ins. Co.* 6 Cush. 42, 49. *Campbell* v. *New England Ins. Co.* 98 Mass. 381, and cases cited. *McCoy* v. *Metropolitan Ins. Co.* 133 Mass. 82. *Ryan* v. *World Ins. Co.* 41 Conn. 168. *Richardson* v. *Maine Ins. Co.* 46 Me. 394. *Britton* v. *Mutual Benefit Ins. Co.* 3 Th. & C. 220, 442. *Edington* v. *Ætna Ins. Co.* 100 N. Y. 536. *Jeffries* v. *Life Ins. Co.* 22 Wall. 47. *Moulor* v. *American Ins. Co.* 111 U. S. 335. *New York Ins. Co.* v. *Fletcher*, 117 U. S. 519. *Phœnix Ins. Co.* v. *Raddin*, 120 U. S. 183.

III. The judge erred in refusing to give the seventh request for a ruling asked for by the defendant in writing. The application and policy in this suit are substantially the same, so far as the questions involved are concerned, as the application and policy referred to in *McCoy* v. *Metropolitan Ins. Co.*, *ubi supra*, in which *Field*, J., says, "In an action at law in this Commonwealth on such a policy, to recover the amount of the insurance, the application is considered as a part of the contract, and if in fact the representations in it are in a material respect untrue, the action cannot be maintained."

IV. If we assume the true rule of law to be that the defendant was bound to prove that the answers were known by the assured to be untrue, or that he believed them to be untrue, it is respectfully submitted that the defendant sustained this burden, not by a preponderance of opposing or conflicting evidence, but by uncontroverted testimony, the truth of which was not questioned. That the assured knew he was being treated for a physical disorder, infirmity, or weakness by Dr. Wyman, in February, 1885, the very time he made his application, is proved most conclusively, and virtually admitted by the plaintiff; that he knew a policy had not been issued on his application to the New England Mutual Aid Society is as clearly proved as the issuing of the policy by the defendant corporation.

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V. The acknowledgment or certificate attached to the application, is divisible into two parts: 1. A warranty that the statements made are true to the best of the applicant's knowledge and belief. 2. An agreement that any untrue or fraudulent statement may forfeit the contract. The terms "untrue" and "fraudulent" are separate or distinct in meaning and intent, and are used with a disjunctive to indicate two distinct and independent states of facts. The legal distinction between them is clear. The one may exist without any intent to deceive, while the other can only exist by reason of such intent. The language in the certificate or policy is as follows: "that the statements and declarations made, &c. are in all respects true." The construction given to these clauses in the charge to the jury was erroneous. The true construction is, that any untrue statement intentionally or ignorantly made would avoid the policy.

R. M. Morse, Jr., for the plaintiff.

DEVENS, J. The certificate or policy on which the plaintiff relies was issued on the condition that "the statements and declarations made by and on behalf of said member in his application to become a benefit member of said association, which are hereby referred to as the basis of this contract, and are a part thereof, and on the faith of which this certificate is issued, are in all respects true, and that no fact has been suppressed relating to his health or circumstances affecting the interests of said association, or their inducement to accept the risk." The application must thus be treated as a part of the contract, — as if it had been incorporated, and thus in terms been made a part thereof. Whether the statements in the application claimed by the defendant to be erroneous are to be treated as warranties which enter into and define, by way of stipulation, description, or otherwise, the precise limits of the obligation which the insurers intended, and which must be literally complied with, whether material or immaterial to the risk, or whether they are representations to be substantially complied with so far as material to the risk, which is often an inquiry of delicacy, does not seem to be of importance in the case at bar. If representations only, they clearly seem to relate to matters material to the risk, and there was much evidence that they were not in fact correct.

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The seven rulings requested by the defendant are based upon the theory that it was entitled to a verdict if the answers of Clapp in reference to such matters were in fact untrue, although made honestly and in good faith. Whether it was so entitled or not must depend upon the construction to be given to the acknowledgment or certificate which was subscribed by the deceased as a part of the application, and which from its language must be held to have controlled and governed the answers to which it referred.

This acknowledgment as it is termed is as follows:

"I, Edward A. Clapp, of West Manchester, county of Essex, State of Massachusetts, do hereby warrant each and all the foregoing particulars and statements to be true to the best of my knowledge and belief, and that I have not, in this application for above-named contract, concealed or withheld any material circumstance or information concerning the past or present state of my health or habits of life; and I do hereby acknowledge, consent, and agree that any untrue or fraudulent statement made above, by me or any one else, or to any medical examiner of said Massachusetts Benefit Association, or any concealment of facts by me or any one else, may forfeit and cancel all rights to any benefit under the above-named contract. Dated at Boston, State of Massachusetts, this 13th day of February, 1885. Edward A. Clapp, Applicant."

The presiding judge ruled that the matter to be passed upon by the jury was "whether or not the deceased acted in good faith in making his answers to the questions that were contained in the application, because if in his answers to the questions in the application he did not state the thing truly, and intentionally did not state it truly, then the present plaintiff cannot recover in this case if he did not state it truly to his best knowledge and belief." He further held, that the words "to the best of my knowledge and belief," found in the first clause of the acknowledgment, were applicable to the second clause, and qualified it as they qualified the earlier clause, and thus that the deceased had not consented or agreed that the contract should be forfeited except it were shown that an untrue or fraudulent statement had been made by him with the knowledge or belief that it was untrue or fraudulent.

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Undoubtedly the acknowledgment may grammatically be separated into two parts; the first a warranty that the statements made are true according to the best of the applicant's knowledge and belief, and the second an agreement that any untrue or fraudulent statement may forfeit the contract. But, if susceptible of such a grammatical construction, it can hardly have been intended that it should have been thus understood. Nor would it be a natural construction, and one that would suggest itself to an applicant. He could not suppose that, while he was only required to warrant that his answers were true according to his "knowledge and belief," his certificate or policy was to be forfeited if an answer honestly made should prove in fact untrue. The language used in the form of acknowledgment does not suggest any idea so much in the nature of a contradiction as this.

These forms are prepared by the insurer with great care and great minuteness of detail. They are often signed in comparative haste. If the association had intended to impose a forfeiture of his certificate upon the applicant because of an untrue statement, while it had only required him to warrant that his statements were true to the best of his knowledge and belief, a contract so anomalous should have been clearly expressed. It must be presumed that the defendant prepared its forms of application and certificate with the intention both of protecting itself against fraud and of securing the just rights of the assured under a valid contract. It is reasonable that its words should be construed against itself, rather than in such a manner that one dealing with it should by any ambiguity be deceived as to his rights.

The defendant urges that the words "untrue or fraudulent," used in the disjunctive and thus expressing different states of things, show that by the use of the first word it was intended that the policy should be avoided if any material thing was untrue, although stated without fraudulent intent. The connection in which the word is used shows otherwise. In following the earlier clause, it means a statement which is untrue in opposition to the sense in which it has been promised that it shall be true. Again, while in strictness a statement is untrue which is not in precise conformity with the facts, yet in a more general sense the word "true" is often used as a synonym of honest or

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sincere, without evasion or fraud. Such is the sense in which it is used in the acknowledgment. *National Bank* v. *Insurance Co.* 95 U. S. 673. *Moulor* v. *American Ins. Co.* 111 U. S. 335. When in the certificate it is said that "the statements and declarations," &c. "are in all respects true," as this must be construed with the application, it must mean that they are true as stated by the applicant to be true, namely, according to his best knowledge and belief. In this respect the case is quite distinguishable from *McCoy* v. *Metropolitan Ins. Co.* 133 Mass. 82, on which the defendant much relies.

We are of opinion, therefore, that the presiding judge rightly refused the rulings requested. He also correctly ruled that the burden of proof was on the defendant to show that the representations made by Clapp were false to the best of his knowledge and belief. *Campbell* v. *New England Ins. Co.* 98 Mass. 381.

The defendant further contends, that, even if the rule be that it is necessary for it to show that Clapp's answers were untrue, and known or believed by him to be so, it has successfully sustained that burden in several instances, and that the jury should have been instructed to render a verdict in accordance with the facts thus established. As an instance, take that in answer to the seventeenth question, "Has any proposal or application to insure your life ever been made to any company or agent upon which a policy has not been issued? If so state full particulars." To this the applicant replied, "No." The defendant urges that it is proved conclusively by the testimony of Mr. Dyer and Dr. Follett that he had made an application to the New England Mutual Aid Society, of which they were respectively the secretary and the consulting physician, on December 18, 1883, for additional insurance, which application was declined, and, further, that the interviews and other circumstances connected with it, and fully testified to, were such that the deceased must have remembered it, and therefore that the defendant was entitled to a verdict.

We do not find that the question thus suggested is fairly raised by the exceptions. The defendant did indeed, by its sixth request, desire the court to rule that, as it appeared that Clapp had made application for insurance on his life to the New England Mutual Aid Society, upon which proposal or application a policy had

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not been issued, the answer to the seventeenth question was untrue, and therefore the defendant was entitled to a verdict. This request we have heretofore held was erroneous, as it left out the element of Clapp's knowledge or belief, as indeed did the general request that a verdict should be ordered for it. The defendant nowhere requested a ruling that the proof made by it of the application of Clapp to another insurance company, of the refusal or failure of that company to grant a certificate, and of Clapp's own knowledge or belief of these facts, was so conclusively proved that it was entitled to a verdict.

Similar remarks are applicable to the inquiry whether the deceased had any sickness or disease other than rupture before February 13, 1885, the defendant claiming to have shown by the testimony of Dr. Wyman that the answer of Clapp to the eleventh interrogatory was untrue, and asking by its third request that it should be ruled that it was therefore entitled to a verdict.

The case was presented by the defendant on the theory that it was entitled to a verdict if Clapp's answers were shown in any material respect to be untrue. This was rejected by the presiding judge, who held that it must be shown also that such statements were known or believed to be untrue. We nowhere find that the defendant ever requested, in regard to either statement of Clapp which was in controversy, a ruling that the proof that it was false, and that Clapp knew or believed it to be so, was so conclusive that, as matter of law, it was entitled to a verdict. It would not be possible in justice to the plaintiff, therefore, to consider now whether such a request could properly have been made. In each request for a ruling, the defendant omitted the element of Clapp's knowledge and belief. This was the point of conflict between its contention and the position taken by the presiding judge, who throughout his instructions insisted that not only must the answers of Clapp be proved untrue, but that they were so according to his knowledge and belief.

Exceptions overruled.

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WILLIAM F. DUFF & another *vs.* MARY LEARY.

Suffolk. March 3, 1888. — April 7, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Adverse Possession — Evidence — Declarations.

Evidence that a tenant, a single woman, in a writ of entry took possession of the demanded premises under an alleged verbal gift from an uncle and occupied them for twenty years, but "never did anything without consulting him" during that period; that she told her friends that she was the owner of the premises; that she let a portion, with her uncle's approval, and collected the rent thereof; that, as she testified, "as regards the tenants, to them I always acted as owner"; that the members of her father's family, who lived with her for much of the time, paid her no rent; that she did "papering or whitewashing, or something like that," to the premises; that her uncle paid the family expenses before and during the twenty years till he died; that he paid for insurance, water rates, repairs, and the taxes, which were assessed to him, as afterwards to his heirs; and that sisters of her uncle, who acknowledged his ownership, occupied part of the premises rent free before and after the tenant took possession, one of whom, as his agent, collected rents of certain tenants, contracted for repairs, and paid therefor with money furnished by him, will not authorize a finding that the tenant acquired a title by adverse possession.

Declarations of an alleged donor of land thereafter as to his ownership, and how the donee occupied it, and his entry of it in an inventory of his property, are incompetent on the questions whether there was a gift, and whether the donee held it by adverse possession.

WRIT OF ENTRY, dated May 29, 1884, to recover a parcel of land on Oak Street in Boston. Plea, *nul disseisin*. The action was brought in accordance with the decision in *Leary* v. *Duff*, 137 Mass. 147, and trial was had in the Superior Court, before *Thompson*, J., who allowed a bill of exceptions, in substance as follows.

It appeared that one John Duff, the father of the demandants and the uncle of the tenant, on April 30, 1859, bought the demanded premises subject to a mortgage which he assumed and agreed to pay; that on May 2, 1864, he paid off the mortgage, which was duly discharged of record; that he died on October 6, 1880, leaving a will, in which no specific devise was made of any real estate, but the residue of his property, real, personal, and mixed, was devised in equal portions to his three children, the demandants and John R. Duff; that at the date of the

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will the testator owned real estate besides the demanded premises; that on April 17, 1882, John R. Duff conveyed his undivided interest in the demanded premises to the demandant William F. Duff; that from the time John Duff purchased the demanded premises, two of his sisters, Mary Duff and Mrs. Hannah E. Manning, a widow, occupied the house thereon free of rent till the spring of 1860; that the tenant, who was fifty-six years old, was the daughter of Catherine Leary, another sister of John Duff; that there had been some estrangement between her uncle and mother, and that the tenant had not spoken to her uncle for twenty years prior to 1860, except once in 1856 or 1857 on the street; that the demandants claimed title as tenants in common of the demanded premises under the residuary devise in the will; and that the tenant claimed title under a verbal gift to her, made in May or June, 1860, by John Duff, of the demanded premises, of which she had had the open, continuous, and exclusive possession ever since.

The tenant testified as follows: "I first saw my uncle at my aunt's, Mrs. Manning's, at No. 41 Oak Street, in March or April, 1860. Miss Mary Duff had left, and Mrs. Manning was about going. He came in to see my aunt. I was visiting her. He said he would like to do something for me; asked about the affairs of the family, about my mother, said he had not seen the family for twenty years. I told him about the family, my father being aged. He asked me about my work, how much I earned, how I got along. I told him in the seasons, fall and spring, I could do very well, the hardest thing I found to do was to pay the rent. He said he would like to do something for me, and he said, 'If you will stop your work now, and get you a house of suitable character, and tell me the price, I will look at it, and buy it for you.' He told me to go the next day and begin to look for a house, and remain with my aunt, and he would pay me the same wages each week as if I was at work in the shop; told me to remain with my aunt until she broke up housekeeping, as she would be lonely. I remained until she moved away. My brother and I helped her move, and the house was shut up. There was a house on Middlesex Street that was for sale, and he asked me to go into it on trial. I moved into it, and paid the rent in advance. I remained about

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four weeks, and I went to see him, met him at the Providence Depot, and told him I did not like the house. He says, 'I will give you a house on Ball Street.' He told me to go and see the owner, he was on the premises. I asked the owner how much one of those houses was. He named the price; I forget what the price was. I went and told my uncle, who was on the street waiting for me. He said, 'Go back, and tell the owner that you want to buy the house if he will give it to you for $200 less than what he asks for it.' I went back and saw the owner, and he would not come to the terms. I went back to my uncle, who was waiting for me, and told him, and he said we had better take the cars and go down to Oak Street. We went down to Oak Street, and he sent me over to the corner grocery to get the key, and we went into the house and looked it over. He said he was to meet my aunt there in Oak Street, and the time was drawing near when he had to meet his train at one o'clock. As we were going out, we met my aunt. He said he could not stay but a few minutes, but would see her in a few days; that he was glad she came out; that he had given me the house, given it to me as mine, and he wanted me to be the sole owner of that house. He then asked me which house I would like best, the one on Ball Street or the present house. I preferred that in Oak Street, being in the central part of the city, and I told him so. He said, 'You take this house, I will make it a present, and give it to you, and you consider yourself the sole owner of it, as a present; you can tell your folks so.' It was after that that Mrs. Manning came, just as we were going out. He had not time to say much to her, only he had given me the house, made me a present of it. She said she hoped I would like it better, and stay in it longer than she did. He asked me when I should move. I told him that day. He said he would come in to the house, then, in Oak Street, the next day. I went and got a teamster, and hired a woman, and moved in that afternoon, and prepared for the family that afternoon, as soon as I could. All got in that evening. He came as he promised, the next day, at a quarter of eleven, and asked me if he could see my mother, he had not seen her for many years, and should not know her. I went upstairs, and told her that uncle wanted to see her. She was very much embarrassed, but she came down. I introduced

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them, and she thanked him for the house, said she could not find words to express herself. He said he had given the house to me, and asked if she would look upon it as my being the sole owner, as I was to take care of my father and mother. She said she would, with tears in her eyes, and she did, until the day she died, look up to me as the owner. My mother died on June 22, 1878, aged seventy-nine years. My father died in October, 1879, aged ninety-three years."

The tenant testified further, that she paid no taxes on the demanded premises; that as to repairs "she did a little papering, whitewashing, or something like that, each fall and spring, in regard to spring cleaning and so forth"; that her uncle "always furnished money for the house, especially at Christmas or Thanksgiving, giving me liberally quite large sums"; that he always paid the grocery and other bills; and that Mrs. Manning came back to live in the house on Oak Street in 1870 or 1871, in regard to whose return her testimony was as follows: "She was visiting us, and told me she had a room in Chester Park, paid a week in advance, and felt sad and lonely to go there. I asked her why could not she come there and take a room. She said she did not know whether my uncle would like it or not. I told her I would meet him, and I went and met him next day, on Temple Place. I told him I was glad to meet him, because I wanted a little business with him. I asked him about my aunt, told him she had left Mr. Willard's, and would like a room there. He did n't seem to approve of it. He said, 'I don't think you had better have her, as she would not continue there when I put her there years ago.' I said it was bad for her to go alone, she was under the doctor's care, and I asked him if he would not let me have her as my tenant, and perhaps I would be different from what my Aunt Mary was. I told her the house was out of repair, and she must put on her own repairs if she came there. She said she would do so if Mr. Duff did n't object to her coming in."

On cross-examination the tenant was asked as to her acts of ownership on the demanded premises, and testified that she lived there and "as regards the tenants, to them I always acted as owner"; that she "collected rents of the tenants"; that Mrs. Manning collected rents, but "not of all the tenants, only

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one or two"; that she told everybody that she "owned the house,—everybody thought I owned the house,—friends of mine, who knew I never had money enough to buy the house"; and that "I did and acted according to my uncle's wishes. If there was anything to be done, he always told me to act as the owner. I do not know as there is anything particularly in the ownership, only claiming the rent and calling it my house, accepting it as a gift. I considered I was the owner by my uncle giving me the title of ownership. I never did anything without consulting him during those twenty years."

Mrs. Symonds, a sister of the tenant, testified, for the tenant, that John Duff told her, as late as 1876, that he had given the house to the tenant, her conversation with John Duff being as follows: "I told him that my sister said that he gave her the house as a present, and that my aunt found a great deal of fault with her, and said she did not believe it. He said Mary was correct, that he did give her the house, and that he told her that he wanted every one to know that the house belonged to her. I told him that my father asked her why she did not have it in black and white, in case anything should happen to Mr. Duff, and he said that was all settled. I asked him if his son John R. Duff knew about the house, and who lived in it. He said he did, and if he died that night that it could be settled just the same as if he was living."

The brother of the tenant testified for her that John Duff told him, in 1861, he had given the house to the tenant.

One Richardson, called by the tenant, testified that his family and himself occupied rooms in the house from 1870 to 1874; that Mrs. Manning was in the house during a part of the time; that he hired his rooms of the tenant and paid rent to her; and that on one occasion, desiring some repairs to be made, he spoke to the tenant, and the repairs were made immediately.

It appeared that John Duff paid the rent of the house on Middlesex Street, for the month previous to the tenant's moving into the house on Oak Street; that, soon after the tenant and her family moved into the house on Oak Street, Mary Duff came back and lived there six or eight years, till she died, in 1868; that Mrs. Manning came there in 1870 or 1871, and lived there till she died, on April 8, 1882, occupying exclusively two or

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three rooms; that the tenant's brother as well as her father and mother always lived there, except for about four years, and her sister lived there till after November, 1883, none of these relatives ever paying to the tenant any rent; that the tenant let a small portion of the house to Richardson for three or four years, and collected and received the rent therefor; and that John Duff knew of and consented to such letting, she consulting him about it, and about the occupancy of the house.

It also appeared, or was admitted, that the taxes on the premises were regularly assessed to John Duff, from 1859 to his death, and paid by him, and since his death to his heirs, and paid by them; that John Duff kept the house insured against fire in his own name; that he paid the water rates for the house, and made or paid for all the repairs on it; that Mrs. Manning, every year, from 1870 to her death, while she occupied two or three rooms, as above stated, collected rents of one or two tenants, ordered and contracted for most of the repairs on the house, directed how the same should be made, and paid for the same, the bills for such repairs being made to her and in her name, though John Duff furnished the money, or gave her the amounts she paid for such repairs, and that the bills were given to him, and that she did not pay rent for her rooms.

The demandants introduced in evidence, as a declaration of a person occupying a part of the premises, the following letter: "Boston, January 19, 1881. John R. Duff, Esq. Dear Sir: I enclose with this the water tax for 1881 of the house No. 85 Oak Street, in which I am living. This house, as you are doubtless aware, belongs to the estate of your late father. He purchased it many years ago and gave the free use of it to me and my sister, intending, as he said, that we should remain in it during our lives should we feel so inclined. It was his custom, also, to pay all the bills on the estate, and to allow us what was necessary for our support. It would be a relief to me if you would be kind enough to let me know whether you propose to continue your father's kindness to us, or what disposition you propose to make of the estate in which we now live. I should not trouble you were it not necessary that I should know what lays before me in the immediate future. I am yours, very respectfully, Hannah E. Manning, No. 85 Oak Street."

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The demandants contended that John Duff allowed his sisters and relatives to live in the house on Oak Street free of rent, and paid the taxes, water rates, repairs, and furnished them money for the purpose of assisting them, and in that way gave them the use of the house; and offered evidence to prove that John Duff, at different times between 1860 and his death, made statements and declarations as to his ownership of the house, and as to how his relatives occupied it, inconsistent with the alleged gift and claim of the tenant; but the judge ruled that the evidence was not admissible for any purpose, and excluded it, it not appearing that the declarations were made on the premises, or in the year of the alleged gift, or in the presence of the tenant. The demandants also offered in evidence an inventory, which was excluded, of the estate of John Duff, made by him on April 1, 1866, in which appeared the entry, "House, 41 Oak Street."

The demandants, among other requests not material, asked the judge to rule: "That there is no evidence that will justify the jury in finding that Mary Leary had disseised John Duff, or obtained a title good against the demandants."

The judge declined so to rule, but gave other instructions, under which the jury returned a verdict for the tenant; and the demandants alleged exceptions. The case was submitted on briefs to all the judges.

A. Hemenway & C. G. Keyes, for the demandants.

S. J. Thomas & J. A. Maxwell, for the tenant.

KNOWLTON, J. The dwelling-house which constitutes the demanded premises became the property of John Duff by a deed dated April 30, 1859. He died on October 26, 1880, and the demandants are two of his children, who hold, under his will and by a deed from their brother John R. Duff, the title which he had at the time of his death. They are entitled to recover, unless the tenant has acquired a title by adverse possession.

The tenant testified, and introduced to corroborate her the testimony of her brother and sister, that John Duff, who was her mother's brother, made to her a verbal gift of the demanded premises in the spring of 1860, and that she, and her father and mother and brother and sister, immediately moved into the house, and that she has been in occupation as owner ever since. If the

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gift was made as she testifies, it was ineffectual to change the ownership of the property. She therefore rests her claim of title upon an alleged disseisin and adverse possession. The principal question before us is whether there was evidence to warrant the jury in finding in her favor upon this claim. The evidence in relation to the gift is immaterial, except as it bears upon the character of her occupation. Both parties must be presumed to have known that the legal title remained in John Duff, and her subsequent acts must be scrutinized, to see whether they constituted actual, open, exclusive, and adverse possession of the real estate for twenty years or more. *Sumner* v. *Stevens*, 6 Met. 337. *Motte* v. *Alger*, 15 Gray, 322.

In the language of the bill of exceptions, "It appeared, or was admitted, that the taxes on the premises were regularly assessed to John Duff from 1859 to his death, and paid by him, and since his death to his heirs, and paid by them; that John Duff kept the house insured against fire in his own name; that he paid the water rates for the house, and made or paid for all the repairs on it; that Mrs. Manning, every year from 1870 to her death, while she occupied two or three rooms, as above stated, collected rents of one or two tenants, ordered or contracted for most of the repairs on the house, directed how the same should be made, and paid for the same, the bills for such repairs being made to her and in her name, though John Duff furnished the money, or gave her the amounts she paid for such repairs, and that the bills were given to him, and that she did not pay rent for her rooms."

The failure on the part of the tenant ever to claim recognition, either as owner or possessor, in regard to the taxation of the property, or the insurance of the house, or the charging of water rates, was hardly consistent with an exclusive possession adverse to the true owner. In making or paying for all the repairs, he, and not she, performed acts of control and management appropriate to possession as well as to ownership. From 1870 to her death in 1882, Mrs. Manning, a sister of John Duff, was in possession of a part of this house. It is evident that her occupation was not under the tenant, for she not only paid no rent, and collected rents all the time of one or two other tenants, but she acted apparently as agent and manager for the owner, in

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ordering most of the repairs on the house, directing how they should be made, paying for them, and giving the bills to John Duff, and receiving from him the amounts which she paid. Her letter, introduced as an accompanying declaration characterizing her occupation, is confirmatory evidence that her possession was under her brother, and not under the tenant. And the same fact appears in the testimony of the tenant, that, when Mrs. Manning was spoken to in 1870 or 1871 about coming back there to live, she was in doubt whether her brother would like it or not, and finally came only after the tenant had obtained his consent, and she was told that he did not object to it.

The acts on which the tenant relies to establish her title are her occupation, and doing "papering or whitewashing, or something like that," and her telling her friends that she was the owner, and her collection of certain rents. She was examined fully and particularly as to her acts of possession, and her general statement that she acted as owner must be taken to mean merely that she acted in the ways specified. *Richmond Iron Works* v. *Wadhams*, 142 Mass. 569, 570. But it is conceded that her occupation was with her father's family, that her brother lived there all the time except about four years, her sister until after November, 1883, her mother until she died in 1878, and her father until he died in 1879, and that none of them ever paid any rent. It is conceded also, that John Duff paid rent for the house where they all lived immediately before moving into this; and that his sisters Mary Duff and Mrs. Manning had occupied this house without charge for rent from the time he bought it until just before the alleged gift to the tenant, and that, soon after, Mary Duff came back into the house and lived there without paying rent until she died, in 1868; and that Mrs. Manning was there from 1870 or 1871 until she died, in 1882. As bearing upon the character of her occupation, it also appeared from the tenant's testimony that her uncle always furnished her money for the house, and paid the grocery and other bills, giving her liberally quite large sums. As to the occupation of the only tenant with whom there was evidence that she ever made an arrangement, it appeared that she consulted her uncle, and that he consented to the letting. In another part of her testimony, she said, "I never did anything without consult-

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ing him during those twenty years." A mortgage, put upon the property before he bought it, was paid by John Duff, and was discharged of record, in May, 1864. Upon the undisputed facts and the tenant's own testimony, it is difficult to see where there was any evidence that she maintained for twenty years a possession, either exclusive, or adverse to the true owner. We think the jury were not warranted in finding that she acquired a title, and the first instruction requested should have been given.

The evidence of declarations of John Duff, made at sundry times, as to his ownership of the house, and how his relatives occupied it, and of his entry of it in the inventory of property belonging to him on April 1, 1866, was rightly excluded. As declarations in his own favor, they were not competent upon the question whether there was a gift, and they had no relation to the alleged acts of possession upon which the tenant rested her case. *Exceptions sustained.*

GEORGE ALLENDORFF *vs.* IGNAZ M. GAUGENGIGL.

Suffolk. March 19, 1888. — April 7, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Mortgage — Life Estate — Married Woman — Title.

If a married woman, the sole owner of land, who signs with her husband a mortgage thereof to secure his note, habendum to the grantee, "his heirs and assigns," and containing the usual power of sale, is mentioned for the first time in a clause near the end, in which she purports to "relinquish all my right, title, and interest . . . . to said grantee, and do hereby release to the said grantee and his heirs and assigns" all right of dower in homestead therein, she conveys only a life estate to the grantee; and a purchaser upon a sale under the power cannot give a "good and clear title" within the meaning of an agreement to sell.

CONTRACT for the breach of an agreement in writing, dated November 12, 1887, by the plaintiff to sell and by the defendant to purchase, at a price named, a parcel of land in Brockton, "containing fourteen acres, more or less. Said premises are to be conveyed on or before December 21, 1887, by a good and

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sufficient warranty deed of the party of the first part, conveying a good and clear title to the same free from all incumbrances, except a certain mortgage for two hundred and fifty dollars given to and now held by said Gaugengigl, dated September 15, 1885."

The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts in substance as follows:

On May 7, 1863, Abby P. Young, the wife of J. Albert Young, became the owner of the fourteen-acre lot, subject to a mortgage, which was afterwards duly discharged of record when a release was made to her. On December 26, 1876, Abby P. Young, together with her husband, to secure a note signed by him alone, signed and delivered to the plaintiff a mortgage deed, which, after reciting that "I, J. Albert Young of Brockton in the county of Plymouth and State of Massachusetts, in consideration of one thousand dollars, to me paid by George Allendorff of said Brockton, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey unto the said George Allendorff, his heirs and assigns,' the fourteen-acre lot and other land described, "to have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said George Allendorff and his heirs and assigns, to their own use and behoof forever," set forth the usual covenants and a power of sale to be exercised by the grantee after any breach of the condition, "the grantor or his heirs or assigns" to execute deeds to confirm any sale, and concluded as follows: "And for the consideration aforesaid, I, Abby P., wife of said J. Albert Young, do hereby relinquish all my right, title, and interest in either of the afore-described premises to said grantee, and do hereby release unto the said grantee and his heirs and assigns all right of or to both dower and homestead in the granted premises. In witness whereof, we, the said J. Albert Young and Abby P., wife of said Young, hereunto set our hands and seals, this twenty-sixth day of December, in the year eighteen hundred and seventy-six."

In May, 1880, the plaintiff foreclosed the mortgage for a breach of condition, and, under the power of sale, duly sold the premises to one Sumner, by whom they were subsequently con-

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veyed to the plaintiff. On September 15, 1885, the plaintiff gave to the defendant the mortgage mentioned in the agreement to sell, and after the execution of that agreement duly tendered to him a deed of the land in question, sufficient in form; but the defendant refused to take it, or to pay the price agreed upon, on the ground that the plaintiff did not have a good title.

If on these facts the plaintiff could give a good and clear title to the premises described in the agreement, saving and excepting the mortgage in said agreement mentioned, then judgment was to be entered for the plaintiff; otherwise, judgment for the defendant.

H. R. Bailey, for the plaintiff.

W. R. Richards, for the defendant.

C. ALLEN, J. The original title was in Mrs. Young, and the plaintiff's title depends on the question whether her title was conveyed by the mortgage of December 26, 1876. She was not a party to the earlier part of the mortgage, and her participation in it as a grantor was limited to the clause near the end, wherein she relinquished her right in the premises to the grantee, and released to the grantee and his heirs and assigns all right of dower and homestead. Her relinquishment of her general title was merely to the grantee, and not to his heirs and assigns. The suggestions of the plaintiff's counsel that the word "grantee" included the grantee and his heirs and assigns, and that the words "heirs and assigns," used later, may be taken as referring back so that the relinquishment to the grantee included his heirs and assigns, are quite inadmissible. So also the suggestion that she was a party to the power of sale in the mortgage, and that her title was concluded by the exercise of that power. The mortgage therefore only included a life estate in the lot now in question; and the title offered by the plaintiff is not good. *Bruce* v. *Wood*, 1 Met. 542. *Raymond* v. *Holden*, 2 Cush. 264.

Judgment affirmed.

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JOHN HEARD & others *vs.* JAMES STURGIS & another, assignees.

Suffolk. November 11, 1887. — April 25, 1888.

Present: MORTON, C. J., DEVENS, FIELD, W. ALLEN, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Alabama Claims — War Premiums — Gift — Bankruptcy — Assignee.

Money paid by the United States, out of the Geneva Award, under the U. S. St. of June 5, 1882, for the reimbursement of war premiums paid from 1861 to 1865, constitutes a gift to one who paid such premiums, and will not pass to his assignee in bankruptcy under an assignment made in 1875. — FIELD & W. ALLEN, JJ., dissenting.

CONTRACT for money had and received. The case was submitted to this court upon an agreed statement of facts, in substance as follows.

The plaintiffs, citizens of the United States, were engaged between April 13, 1861, and April 9, 1865, as partners, under the firm name of Augustine Heard & Co., in the business of buying and shipping steamers for China, of receiving and selling merchandise from China, and of insuring merchandise and vessels. During that period the plaintiffs bore true allegiance to the government of the United States, and after the sailing of the first Confederate cruiser paid in the course of their business certain enhanced payments of insurance, otherwise called payments of premiums for war risks, or war premiums, on such merchandise and vessels.

On May 31, 1865, the firm of Augustine Heard & Co. was dissolved by the agreement of the members thereof. On August 5, 1875, the plaintiffs were severally adjudicated bankrupts in the United States District Court for the District of Massachusetts; on September 11, 1875, assignments in bankruptcy in the usual form were made to the defendants; and on July 20, 1877, the plaintiffs received their discharge in bankruptcy. The firm, and each of the plaintiffs individually, were solvent when it was dissolved, and all the debts owed by the plaintiffs at the time of their adjudication in bankruptcy were incurred after the dissolution. The estate of the bankrupts received by

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the defendants hitherto has proved insufficient to pay in full the debts of the bankrupts.

In December, 1886, an award was made by the Court of Commissioners of Alabama Claims to the defendants, as assignees in bankruptcy of the plaintiffs, in proceedings in that court to which the plaintiffs were parties, on account of such payments of war premiums by the plaintiffs, and was in part paid to the defendants by the United States, the amount of the Geneva Award unappropriated being insufficient to pay the war premium awards in full. Of the sum so awarded and paid, there remained in the hands of the defendants, after paying the reasonable expenses of prosecuting the claim before the Court of Commissioners of Alabama Claims and collecting the award, the sum of $13,612.85.

The Treaty of Washington between the United States and Great Britain, promulgated July 4, 1871; the decisions rendered by the Tribunal of Arbitration at Geneva, and the final decision and award made by that tribunal, on September 18, 1872; the acts of Congress of June 23, 1874, and of June 5, 1882, respectively, creating and re-establishing the Court of Commissioners of Alabama Claims; and the several acts of Congress relating to that court and the payment of its awards, are to be treated as facts in this case, and may be referred to at the argument.

No controversy or question existed between the parties as to the proportions in which the plaintiffs were entitled, if at all, to the sum recovered, or as to its distribution. If, upon the facts, the plaintiffs were entitled to recover, judgment was to be entered for them, and the case was to stand for the assessment of damages; otherwise, judgment for the defendants. In either event, the expenses of this action and reasonable counsel fees to each party to be paid out of the fund.

The case was argued at the bar in November, 1887, and afterwards was submitted on the briefs to all the judges.

H. W. Putnam, for the plaintiffs.

C. A. Williams, for the defendants.

HOLMES, J. The plaintiffs in this case are parties who paid enhanced premiums for insurance on war risks from 1861 to 1865. The defendants are their assignees in bankruptcy, under an assignment made in 1875. They have received money from

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the United States, according to a decision of the Court of Commissioners of Alabama Claims under the act of Congress of June 5, 1882, in respect of the war premiums paid by the plaintiffs; and the question is whether they are entitled to hold that money under the assignment, which it will be noticed was made before the act was passed, by force of which the money was paid by the United States.

It is settled that the adjudication of the commissioners is not conclusive between the parties. That adjudication only decides upon the amount and validity of the claim as against the United States, sets apart and identifies the fund for the benefit of whoever ultimately may prove entitled to it under the proper construction of the statute, and leaves the rights of all persons claiming to be entitled to the sum awarded to the ordinary course of proceeding in the established courts. *Leonard* v. *Nye*, 125 Mass. 455, 466. *Comegys* v. *Vasse*, 1 Pet. 193, 212. The Court of Commissioners have expressed and acted on this view of the law. *McLeane* v. *United States*, Davis's Report of Decisions of Commissioners, 112. 44th Cong. 2d Sess. Senate Ex. Doc. No. 21. *The Bankruptcy Question*, March, 1884, in Rules, Opinions, &c. of Court of Comm. of Ala. Claims, Washington, 1885. The only question is whether the right of the defendants is equally established by *Leonard* v. *Nye* and *Comegys* v. *Vasse*, or whether there is a satisfactory distinction to be taken between those cases and the case at bar.

There is no need of stating in detail well-known cases in easily accessible reports. It is enough to say, that the American decisions establish that when this government collects a sum from a foreign government in respect of wrongs to our citizens, and subsequently passes a law to distribute the fund collected to the parties wronged, this government is to be regarded as having stood from the beginning *quasi* in the position of an agent to collect on behalf of its subjects, and a trustee of the fund when collected, and thus that the payment when made is to be treated as if made in pursuance of a duty on its part, and in satisfaction of a vested right of the subject, and not as a pure gratuity and gift. *Comegys* v. *Vasse*, and *Leonard* v. *Nye*, *ubi supra*. *Bachman* v. *Lawson*, 109 U. S. 659, 663. *Gracie* v. *New York Ins. Co.* 8 Johns. 237, 245. So as to claims against the

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government for proceeds of captured property. *Erwin* v. *United States*, 97 U. S. 392. It follows from this view, and it is decided, that such claims pass to an assignee in bankruptcy or insolvency under an assignment earlier in date than the act providing for the payment of the claims. *Leonard* v. *Nye*, *ubi supra*. *Jones* v. *Dexter*, 125 Mass. 469. *Comegys* v. *Vasse*, *ubi supra*. *Phelps* v. *McDonald*, 99 U. S. 298. *Plater* v. *Scott*, 6 Gill & J. 116.

We are bound by these decisions as far as they go. Undoubtedly, if the acts with which they deal had been in force before the respective assignments, no one would have felt any hesitation about the result merely by reason of his opinions as to the relations of subject and sovereign, or the impossibility of the former having a right in a strict juridical sense against the latter; and perhaps it would not have mattered whether the sum given by the act was a pure gratuity, or was founded upon a moral consideration, so long as the government positively undertook to pay. Compare *Ex parte Huggins*, 21 Ch. D. 85; *Ex parte Webber*, 18 Q. B. D. 111. Undoubtedly, too, an act may be passed at any time providing expressly or by implication that the sums distributed shall be paid to the use of such persons as would have been entitled at the time of payment, if the claims forming the moral consideration of the statute had been legal claims from the beginning. Furthermore, there is a very intelligible reason for giving that effect to a statute which distributes a fund, collected as we have supposed, to sufferers in respect of whose sufferings the claim was collected. The commercial and practical, rather than strictly juridical, light in which we are in the habit of regarding the sovereign power, makes it natural and easy to adopt such a view.

But it must be remembered, whenever a new statute comes up for consideration, that although it may be found by construction to give what it gives as if in pursuance of a legal duty, there is no such legal duty in fact, and no antecedent right on the part of the persons who receive its benefits. It is only tautologous to say that the law knows nothing of moral rights unless they are also legal rights, and from before the days of Hobbes the argument has been public property that there is no such thing as a right created by law, as against the sovereign who makes the law by which the right is to be created. *Bur-*

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nand v. *Rodocanachi*, 7 App. Cas. 333, 336. Hobbes, De Cive, c. 6, § 14 (Op. Lat. ii. 227); Leviathan, c. 26 (Eng. Works, iii. 250–252). Sir John Eliot, De Jure Maiestatis, c. 3. Bodin. De Republica, I. c. 8. Bentham, Fragment on Government, c. 5 (Works, i. 292, 293). Austin, Jurisprudence, Lect. 6, pp. 286, 287 (3d ed.).

In every case, then, some reason must be found, either in the words of the distributing statute, or in what we have called the moral consideration for it, as that the fund if received by a private person would have been charged with a trust, or that the sovereign but for his sovereignty would be bound to indemnify the distributees for some previous loss, before the distribution can be regarded as anything more than a simple gift.

In the present case there is no pretence that the United States received the money paid over by the Geneva Award upon any trust in favor of those who paid war premiums, even in the attenuated sense in which it may be said to have done so for those whose vessels were destroyed by the Alabama, &c. On the contrary, claims for war premiums, as such, were expressly withdrawn from the consideration of the Geneva tribunal. Protocols 5, 6, and 7 of the Conferences of the Arbitrators. Message and Documents, Department of State, Part 2, Vol. IV., 1872–73, pp. 19–22. The corner-stone of the decision in *Leonard* v. *Nye* is wanting. The ground on which that case went may be seen from the following extract from the opinion:

"The claims for the destruction of property of citizens of the United States by the Alabama and the Florida, and by the Shenandoah after her departure from Melbourne, through the violation by Great Britain of her international duty, were claims for which the owners of the property destroyed were justly entitled to compensation from Great Britain, although they could not obtain their rights in the ordinary course of judicial proceedings, but only by petition to the British government, or through the interposition of their own government. Compensation for those losses was demanded by the United States from Great Britain as a matter of right, and as such was awarded by the decision of the Tribunal of Arbitration created by the treaty between the two governments. The act of Congress for the adjudication and disposition of the moneys received from Great Britain, pursuant

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to that decision, provided for their application to the payment of claims directly resulting from the damage caused by those insurgent cruisers; and the sum awarded to this defendant by the commissioners appointed under that act of Congress was upon such a claim. It must therefore be treated as awarded and paid to him by reason of his interest in property so destroyed, and of his right to compensation for its destruction, and as capable of passing by an assignment from him, in any form recognized by law, though made after the destruction of the property and before the award of indemnity." 125 Mass. 465, 466.

This language follows the same lines as *Comegys* v. *Vasse*, and marks the limit beyond which we cannot go.

We do not understand it to be argued that the plaintiffs had any claim against the United States government for indemnity irrespective and outside of a claim sounding in trust against the fund received from Great Britain, so that apart from trust the allowance made by the statute should be construed as recognizing a pre-existing obligation. The allowance is in respect of war premiums generally. It is not confined to those which possibly might found a claim by way of subrogation to the insurer on the ground that the premiums were paid to mutual companies and were used to pay losses. Inasmuch as presumably the cost of the war premiums in general ultimately fell upon the purchasers of insured goods, a claim against the government for indemnity in respect of them would resolve itself finally into a claim of all the members of the community for increased cost of living on account of the war.

If the plaintiffs had no claim for indemnity against the United States, it is not material whether they had a claim against Great Britain or not, so long as no part of the fund received by the United States was paid in respect of any such claim. But it may be noticed that the Geneva tribunal, certainly a respectable authority, expressed the opinion "that these claims do not constitute, upon the principles of international law applicable to such cases, good foundation for an award of compensation or computation of damages between nations, and should, upon such principles, be wholly excluded from the consideration of the tribunal in making its award." Protocol 5, *ubi supra*. Even if the United States had not yielded to this opinion, but still

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asserted a liability on the part of Great Britain, such an assertion would not be equivalent to an assertion of its own liability to indemnify its citizens. And as it certainly never has admitted such a liability, and as it has received no money from Great Britain in respect of the claim, there are no grounds outside the words of the act of June 5, 1882, for saying that it recognizes a pre-existing right against the United States on the part of all who paid war premiums.

The decisions to which we have adverted do not go on the language of the statutes which were under discussion, but upon the nature of the claims forming what we have called the moral consideration for the respective acts. There is nothing decisive in the language of the act before us, but the circumstances and the words used are at least as favorable to the view that this payment of war premiums was by way of gratuity, as to any other. The act was not passed until the persons whose claims were within the scope of the Geneva Award had been satisfied, and dealt with a surplus left over from the sum in gross awarded. Claims under the act for war premiums are subordinated to claims for destruction of property; and it may be noticed for what it is worth, that, while the act of June 23, 1874, § 12, provides for deducting compensation or indemnity received by the party injured or his assignees, the act of June 5, 1882, § 6, does not mention assignees, and does not use the word "compensation," but only "indemnity, dividend, set-off," &c., possibly indicating a recognition that the "claims" upon the Alabama fund created by the statute were claims in respect of which no one ever had had a right to compensation, and which had never passed by an assignment, because they had no existence until the statute created them. This construction is helped by the well-known fact that Congress hesitated long between several competing applicants for a share in the surplus fund, including the insurance companies and the Treasury itself.

If the sum in controversy was a pure gift to the plaintiffs, to which they had no claim as of right in any sense, it did not pass to their assignees. *Emerson* v. *Hall*, 13 Pet. 409. *Gillan* v. *Gillan*, 55 Penn. St. 430. Even if assignees in bankruptcy are universal successors, they succeed only to the rights and interests which the bankrupt has at the time, not, of course, to anything

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which he afterwards may acquire by a title wholly subsequent. U. S. Rev. Sts. § 5044. Executors stand in a different position. They "represent the person of the testator." St. 9 Ed. III. st. 1, c. 3. Littleton, § 337. *Overton* v. *Sydall*, Poph. 120, 121; *S. C.* Gouldsb. 120, pl. 6. *Boyer* v. *Rivet*, 3 Bulstr. 317, 321. *Bain* v. *Cooper*, 1 Dowl. Pr. Cas. (N. S.) 11, 14. They would take, if their testator had died before the act of 1882 was passed; and if the will contained a residuary clause, it might be construed to apply to the sum received by them as representing him, in accordance with the rule laid down by Lord Hardwicke in *Green* v. *Ekins*, 2 Atk. 473, 476, that, "if the personal estate is increased by any event after the death of the testator, it is part of the residue, and will pass as such." *Grant* v. *Bodwell*, 78 Maine, 460, 465. *Pierce* v. *Stidworthy*, 79 Maine, 234. Our decision is in accordance with *Brooks* v. *Ahrens*, 68 Md. 212, and *Taft* v. *Marsily*, 47 Hun, 175. *Judgment for the plaintiffs.*

FIELD, J. I cannot assent to the opinion of the court.

It is said that the plaintiffs in the case at bar had no right or property in any claim to be repaid the war premiums paid by them until this right or property was created by the act of Congress of June 5, 1882; that Great Britain paid no money to the United States on account of war premiums; that no trust in any sense in favor of the plaintiffs attached to the money received under the Geneva Award; and that therefore in 1875, when the plaintiffs became bankrupts, and an assignment of their property in the usual form was made to the defendants as their assignees, the plaintiffs had no property in the claim which could pass under the assignment.

In *Leonard* v. *Nye*, 125 Mass. 455, the defendant was adjudged a bankrupt in February, 1868, and in January, 1875, he presented a claim to the Court of Commissioners of Alabama Claims for damages sustained by the destruction of merchandise by the insurgent cruiser Shenandoah, after her departure from Melbourne, and a sum of money was awarded to him as damages on April 5, 1876, which was paid him on September 15, 1876; and the plaintiff, being the defendant's assignee in bankruptcy, recovered it in the action. It is said in the opinion, at page 466, that although the assignment in bankruptcy was

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before the Treaty of Washington, and before the passage of the act of Congress of June 23, 1874, yet the money must "be treated as awarded and paid to him by reason of his interest in property so destroyed, and of his right to compensation for its destruction, and as capable of passing by an assignment from him, in any form recognized by law, though made after the destruction of the property and before the award of indemnity." The distinction taken between that case and this is, that the money paid by Great Britain was paid and received as compensation for the destruction of property, in which was included the property of the defendant in *Leonard* v. *Nye*, but was not paid or received as compensation for the war premiums which the plaintiffs in the case at bar had paid. The case of *Leonard* v. *Nye* states the settled law of the United States as to money paid to claimants under the act of June 23, 1874, and other similar statutes. *Comegys* v. *Vasse*, 1 Pet. 193. *United States* v. *Hunter*, 5 Mason, 62; *S. C.* 5 Pet. 173. *Frevall* v. *Bache*, 14 Pet. 95. *Milnor* v. *Metz*, 16 Pet. 221. *Erwin* v. *United States*, 97 U. S. 392. *Phelps* v. *McDonald*, 99 U. S. 298. *Bachman* v. *Lawson*, 109 U. S. 659.

The decision of the House of Lords in *Burnand* v. *Rodocanachi*, 7 App. Cas. 333, is clearly the same as would have been rendered here, whatever criticisms might be made upon some of the language found in the opinions.

The money awarded under the act of June 23, 1874, or under that of June 5, 1882, was perhaps, in a strict legal sense, a gift by the United States, because the United States were under no legal obligation to pay the money received from Great Britain to any one. Neither was Great Britain in the matter of the Alabama claims under any legal relations to citizens of the United States. *United States* v. *Diekelman*, 92 U. S. 520, 524. But governments often recognize obligations towards each other, or towards their own citizens, or towards the citizens or subjects of foreign states, which are analogous to the obligations enforced in judicial courts between litigants. To what extent they will do this, when they will follow and when depart from the rules which prevail in judicial courts, is in the discretion of the sovereign power, and in the case at bar it must be determined from the acts of Congress whether the money thereby appropri-

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ated was intended as a gratuity, or as compensation for services rendered or for money paid, or for property lost, taken, or destroyed. *Milnor* v. *Metz*, *ubi supra*.

It is apparent, I think, that Congress, in enacting the St. of June 5, 1882, as well as that of June 23, 1874, did not intend that the money appropriated to claimants under these acts should be a gratuity, because it is appropriated on account of a loss of property, and as compensation for the loss, for which claim had been made from a time anterior to the Treaty of Washington. If the United States had submitted the distribution of the fund received from Great Britain to the judicial courts without any directions other than those which the rules of municipal jurisprudence afford, it may be that the fund would have been distributed among the owners of property destroyed by the inculpated cruisers, or the representatives or assigns of such owners, and that insurance companies which had paid a loss would have been subrogated to the rights of the assured. But Congress saw fit to give explicit directions in regard to the appropriation of the money in both the St. of June 23, 1874, and in the St. of June 5, 1882. Neither of these statutes deals with any money except that received from the Geneva Award, and Congress by these statutes has in fact appropriated it all to the payment of claims for the loss of property, and for the expenses of the Court of Commissioners of Alabama Claims; and Congress was the only tribunal competent to determine to whom, and in what manner, if at all, the money should be appropriated and the claims satisfied. If Congress intended by these statutes to appropriate the money to certain persons as a gratuity, the only matters for the Court of Commissioners to deal with would have been the persons intended by the statutes, and the amounts given to each, and it is difficult to see how a judicial court could re-examine the distribution made by the Court of Commissioners unless the persons to whom that court awarded the money claimed and received it in some representative capacity. The judicial courts determine the ownership of the money awarded only on the ground that it follows the ownership of the property as compensation for which the awards were made. Congress did not, however, in these statutes, specify the persons entitled to receive the money

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otherwise than by describing the claims to be admitted, except that it provided for the exclusion of claims for the loss of property insured to the extent of the indemnity received from the insurance, and that no claim should be allowed "in favor of any person not entitled at the time of the loss to the protection of the United States in the premises," nor "in favor of any person who did not at all times during the late rebellion bear true allegiance to the United States."

The Court of Commissioners of Alabama Claims were, under the St. of June 23, 1874, § 11, to adjudicate upon all claims admissible under the act "directly resulting from damage caused by the" inculpated cruisers, and under the St. of June 5, 1882, § 5, upon claims "directly resulting from damage done on the high seas by Confederate cruisers during the late rebellion," and "claims for the payment of premiums for war risks." Under each of these statutes the Court of Commissioners held that the persons to present the petitions were the persons who owned the property damaged, or who had paid the war premiums, or their personal representatives if they were dead, or their assigns if the claims had been assigned either by voluntary conveyance or by operation of law, although an assignee might prosecute the claim in the name of the assignor, or the assignor might prosecute it if the assignee did not intervene. The practice and proceedings under which assignees in bankruptcy were admitted as claimants were established under the St. of June 23, 1874, being c. 459 of the acts that year, and were well known when the St. of June 5, 1882, was passed, and the latter statute provides, in § 4, "that the practice and proceedings established and directed by said chapter four hundred and fifty-nine shall be followed and had in regard to all claims provable under this act, and it shall be the duty of the said court hereby re-established in the mode, and subject to all the conditions, limitations, and provisions of said chapter four hundred and fifty-nine, except as changed and modified by this act, to receive and examine the claims mentioned in section five of this act," &c.

The claimants for property destroyed, and for war premiums paid, both made their claims originally on the grounds of natural justice and international obligation; but until the treaty, the rules by which the conduct of Great Britain was to be

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tested were in dispute between the governments, and the fact that Great Britain had violated those rules was first conclusively established by the Geneva Award. It was for the United States to determine on what trusts, if any, they received the money, and to appropriate it as they saw fit, and it is not competent for this court to decide whether Congress in fact rightly appropriated it or not. If the acts of Congress appropriated the money to certain persons as a gratuity, the awards of the Court of Commissioners of Alabama Claims must be held by the judicial courts as gifts; but if these acts appropriated the money as a compensation for the loss of property, the judicial courts must so treat the awards. The legal connection between the awards and the money received from Great Britain, or the awards and the money appropriated by the United States, is established by the acts of Congress, construed in connection with the subject and the circumstances, and not by any opinion of a moral equity not recognized by the acts.

The question whether any distinction could be recognized between claims under the St. of June 23, 1874, and claims under the St. of June 5, 1882, in reference to the rights of assignees in bankruptcy, or assignees under voluntary assignments, was presented before the Court of Commissioners of Alabama Claims, and it was decided in an elaborate opinion that no distinction could be made. It was said in the opinion, that "Neither of the acts can properly be regarded as creating a bounty for these claimants. Both alike were the acts of the sovereign state dispensing justice, and not distributing alms to its citizens. . . . . Our government had always insisted that all these claims were just demands upon Great Britain, and the acts of 1874 and 1882 reaffirmed that position, and provided a way by which all these sufferers alike might be reimbursed to the extent of the fund awarded at Geneva, giving the preference to those who had sustained direct losses. And this recognition of the right of the claimants in this fund must be held to relate back to the time when their losses occurred." French, J., in *The Bankruptcy Question*, March, 1884, in Rules, Opinions, &c. of Court of Comm. of Ala. Claims, Washington, 1885.

A similar question arising in the administration of the estates of deceased persons has been decided in the same way, and for

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the same reasons, by the Supreme Judicial Court of Maine, in *Grant* v. *Bodwell*, 78 Maine, 460, and in *Pierce* v. *Stidworthy*, 79 Maine, 234. The Supreme Court of New York, in *Taft* v. *Marsily*, 47 Hun, 175, and the Court of Appeals of Maryland, in *Brooks* v. *Ahrens*, 68 Md. 212, decided that the money appropriated by the act of 1882 was a gratuity, and that no claim existed before the passage of the act which would pass to assignees in bankruptcy. In the opinions in these last two cases *Emerson* v. *Hall*, 13 Pet. 409, is cited as authority.

In *Emerson* v. *Hall*, Chew, Emerson, and Lorrain were respectively collector, surveyor, and naval officer of the port of New Orleans, and they seized and procured the condemnation of the Brig Josepha Secunda for an infraction of the laws against the slave trade, and by the District Court they were allowed one half of the proceeds. This part of the decree was reversed by the Supreme Court of the United States, on the ground that the statutes giving one half of the proceeds of condemned property to the seizing officers did not apply to such a case. The seizure was in 1818. In 1828 Emerson died, leaving heirs. On March 3, 1831, Congress passed an act entitled "An Act for the relief of Beverly Chew, the heirs of William Emerson, deceased, and the heirs of Edward Lorrain, deceased." The act directed the District Court to pay over the one half of the proceeds "to the said Beverly Chew and the legal representatives of the said William Emerson and Edward Lorrain respectively." A part of this money was received by the minor children of Emerson as his legal representatives, and the suit was to compel the tutor and curator of these children to pay out of this money a judgment which had been recovered against Emerson in his lifetime. The court held that it was a gift by Congress, that the act intended that the money should be paid to the heirs of Emerson, as the persons designated in the act as his legal representatives. The language of the act of Congress, as construed by the court, shows that it was not the intention of Congress that the money should be paid as a part of the estate of Emerson, but should be given to his heirs.

In *Milnor* v. *Metz*, 16 Pet. 221, Milnor and Thompson had been gaugers at the port of Philadelphia for the years 1836 and 1837, upon a salary of $1,500 a year. The act of July 4, 1836,

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reduced the duties on wines, under which they were required to regauge the wines. They presented a memorial to Congress in January, 1838, for extra pay for their services. In December, 1838, Milnor applied for the benefit of the insolvent laws of Pennsylvania, and in accordance with these laws he executed an assignment of his property, on January 11, 1839, and he mentioned this claim against the United States in the statement of his property which he was required to make; he received his discharge in the same January. Congress, on May 2, 1840, passed an act "that the Secretary of the Treasury be, and is hereby, directed to pay to Robert Milnor and John Thompson the sum of two thousand seven hundred and fifty-seven dollars and twenty-three cents, being the amount of fees equitably due" to them for extra services, &c. 6 U. S. Sts. at Large, 798. Metz, the assignee in insolvency of Milnor, made no claim before Congress, but after the act he claimed one half of the amount (it being admitted that Milnor's share was one half); his claim being rejected, thereupon he brought suit against the Secretary of the Treasury, Milnor, and others, and the court held that the money belonged to the assignee.

I cannot distinguish the principles which should govern the case at bar from those declared in *Comegys* v. *Vasse*, and the other cases cited. I think that the claim of the plaintiffs was a claim growing out of and relating to property; that it has been so treated by Congress in the act of June 5, 1882; that the money appropriated by Congress was appropriated in satisfaction of this claim; and that the money awarded is a part of the estate of the plaintiffs which passed to the assignees under the assignment in bankruptcy.

Mr. Justice William Allen concurs in this dissent.

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COMMERCIAL WHARF COMPANY *vs.* AUGUSTUS WINSOR & others.

Suffolk. January 26, 1888. — May 3, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Indenture — Covenant — Equity Pleading — Parties — Statute.

A covenant in an indenture between the owners of adjacent wharves as to the use of an intervening dock, beneficial to the covenantee and restricting its use by the covenantor, is enforceable in equity by a grantee of the covenantee against a lessee of the covenantor with notice; and the covenantor is a proper party defendant.

An indenture between the owners of C. Wharf and T Wharf established an intervening dock over their flats as far as low-water mark, and provided that a part of the dock should be kept open as a common passageway. Mutual covenants provided that they should not "obstruct or incumber said common highway or passageway, or any part thereof, nor authorize or consent that the said highway, or any part of it, shall be obstructed or incumbered in any manner." Subsequently C. Wharf was conveyed by a deed bounding it at low-water mark, and both wharves were extended to a new line by statutes, referring to the common passageway as a boundary only, and providing against an impairment of the rights of either owner thereby, the statute as to T Wharf, however, giving its owner "the right and privilege of using and occupying the flats adjacent to said wharf so extended at the end and sides thereof in the same manner in which they have hitherto occupied and enjoyed the flats and docks adjoining said wharf as it now is." The owner of T Wharf leased it, and the lessees authorized and consented to vessels so lying thereat as to project into the common passageway. *Held*, that the grantee of C. Wharf was entitled to maintain a bill in equity against the owner and lessees of T Wharf to restrain such use of the common passageway above, but not below, low-water mark.

BILL IN EQUITY to restrain the defendants, who were the lessees and owners of T Wharf, from using a common passageway between the private docks of Commercial Wharf and T Wharf as a berth for vessels. The defendants demurred to the bill, among other grounds, for want of equity, and because the owners of T Wharf were not proper parties. Hearing before *Gardner*, J., who made certain findings of fact, and reserved the case for the consideration of the full court. Certain plans were used at the hearing, a copy of so much of which as is material appears in the margin of the next page. The case was argued at the bar

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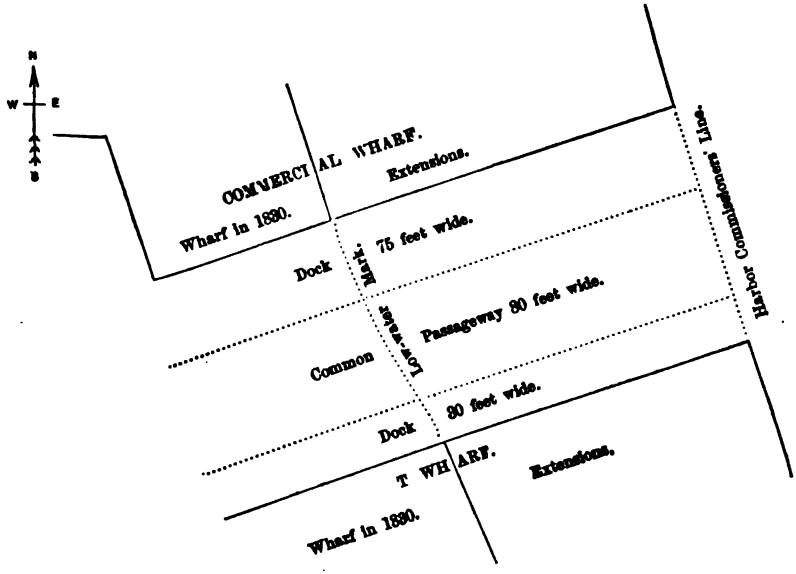
in January, 1888, and afterwards was submitted on briefs to all the judges. The facts appear in the opinion.

G. O. Shattuck & J. C. Ropes, for the plaintiff.

E. R. Hoar & J. D. Bryant, for the owners of T Wharf.

J. O. Teele, for the lessees.

W. ALLEN, J. This is a bill to enforce covenants made by the owners of T Wharf with the Mercantile Wharf Corporation, contained in a tripartite indenture made by the city of Boston, the Mercantile Wharf Corporation, and the owners of T Wharf, on December 3, 1830. The object of the indenture was to establish and to regulate the use of a dock over flats owned by the parties, for the benefit of their adjoining lands and wharves. The dock as established extended from the harbor channel westerly to Commercial Street, a distance of about twelve hundred feet. The greater part of the dock has since been filled up, and only five or six hundred feet of the easterly part as established remains. T Wharf extended the whole of this distance on the southerly side of the dock. Commercial Wharf, which belonged to the Mercantile Wharf Corporation, and has since been conveyed by it to the plaintiff, extended on the northerly side of the



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dock for the distance of about one hundred and fifty feet from the harbor channel.

By the indenture a portion of the dock eighty feet in width was to be kept as a "common highway or passageway" for the use of the parties for the purpose of going to and from their respective wharves. The part of the dock between the common passageway and the southerly line of the dock, on which was T Wharf, was to be the private dock of the owners of T Wharf, and the part between the common passageway and the northerly line of the dock, on which was Commercial Wharf, was to be the private dock of the Mercantile Wharf Corporation. The whole width of the dock was one hundred and eighty-five feet, thirty feet of it being the dock of T Wharf, eighty feet the common passageway, and seventy-five feet the dock of Commercial Wharf. The indenture provided in regard to the common highway or passageway that it should forever be kept open and unincumbered for the use of vessels passing to or from the respective wharves of the parties; that the owners of T Wharf should have no right of anchorage, wharfage, or dockage, in any part of the dock except the thirty feet next their wharf; and the owners of T Wharf covenanted with each of the other parties that they would not "obstruct or incumber the said common highway or passageway, or any part thereof, nor authorize or consent that the said highway, or any part of it, shall be obstructed or incumbered in any manner," with an exception which is not material. Corresponding provisions and covenants were made in respect to and by the Mercantile Wharf Corporation; and there were provisions and covenants in regard to the use of the private docks of the respective parties. These covenants of the owners of T Wharf with the Mercantile Wharf Corporation were clearly for the benefit of the land of the covenantee, and put a restriction in favor of that land upon the use by the covenantors of the common passageway, which can be enforced by the grantee of the covenantee against the grantees with notice of the covenantors. *Whitney* v. *Union Railway*, 11 Gray, 359. *Long Wharf* v. *Central Wharf*, 14 Allen, 271.

The plaintiff is a grantee, by a recorded deed, from the Mercantile Wharf Corporation, of a parcel of the land for the benefit of which the covenants were made, and is entitled to enforce the

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covenants and restrictions, as far as they are for the benefit of that part of the land, against the defendants, who, as lessees and owners, hold the estate of the covenantors to which the restrictions attach.

The evidence sustains the finding of the justice who heard the case, that it has been frequent that vessels two and three tiers deep have lain at T Wharf, attached to it or to that vessel nearest the wharf, all but the inner tier of which have been within the common highway or passageway, and that this has been authorized and consented to by those of the defendants who are the lessees of the wharf. If they allowed vessels moored in that way to discharge at their wharf, and took wharfage therefor, they cannot be permitted to say that they did not authorize or consent to that mode of using their wharf. They thereby asserted a right in the flats under the common passageway which was not the public right of navigation over them, but the private right of wharf-owners to the exclusive occupancy of them by vessels moored to or discharging at the wharf, such as might work a disseisin of an owner of them. See *Tufts* v. *Charlestown*, 117 Mass. 401, and cases cited. By allowing vessels to lie at their wharf in the manner shown by the evidence, the defendants clearly violated the covenants of the indenture. It does not appear that the plaintiff suffered any damage or inconvenience from vessels so lying on the flats included in the indenture; but the proper method in which the plaintiff can vindicate its right, which is infringed and denied by the defendants, is by a suit in equity, and it is therefore entitled to a decree in order to preserve its rights. There is no evidence to sustain the defence that the plaintiff by its conduct has waived its rights, or estopped itself from asserting them. The owners of T Wharf are proper parties defendant to the bill, as the rights of their lessees under the lease are involved.

The plaintiff contends that the restrictions of the indenture apply not only to the land described in it, but to the space between T and Commercial Wharves as they were extended beyond low-water mark after the indenture. The dock established by the indenture was bounded easterly by the edge of the harbor channel, which was a fixed line, and, it is agreed, was at low-water mark. The deed from the Mercantile Wharf Corporation

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to the plaintiff extended to and bounded definitely and expressly on this line. T Wharf and Commercial Wharf extended to this line. The statute which incorporated the plaintiff, and authorized the purchase by it of Commercial Wharf, authorized the extension of the wharf below low-water mark to a certain line (St. 1832, c. 51), and by a statute passed on the same day T Wharf was authorized to be extended to the same line (St. 1832, c. 57). Subsequently, by the St. of 1837, c. 229, the line of the harbor was established still farther to the east, beyond low-water mark, and it was provided that no wharf should ever be extended beyond that line, and that none should be extended towards it, unless under authority already given, without leave of the Legislature. Both of the wharves were subsequently extended to that line, under the St. of 1839, c. 25, and the St. of 1839, c. 77. The extensions of Commercial Wharf were considerably more than the length of the wharf on the dock before the extension. The plaintiff contends that the space between the wharves as extended beyond low-water mark is subject to the agreements, covenants, and restrictions of the indenture. This certainly cannot be by force of the indenture.

Even if the extension had the effect to give to the respective owners of the wharves the title to the flats between the wharves as extended, it could not thereby extend the covenants of the indenture over such newly acquired property. But the authority to extend the wharves gave no title to the flats not occupied by them when extended. The establishment of the new harbor line did not carry out low-water mark, and the line of private ownership remained as it had been, at the old line of the harbor channel. The only private right either party had within the harbor channel was that given it by the statutes authorizing the extension of its wharf, namely, a right to extend into the harbor channel, within certain lines, a wharf built on piles; and to the plaintiff the right to lay vessels at its wharf, (Sts. 1832, c. 51; 1839, c. 25,) and to the owners of T Wharf "the right and privilege of using and occupying the flats adjacent to said wharf, when so extended at the end and the sides thereof, in the same manner in which they have hitherto occupied and enjoyed the flats and docks adjoining said wharf as it now is." Sts. 1832, c. 57; 1839, c. 77. These provisions do not give to the owners of T Wharf any private right to the flats between the extended

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wharves beyond thirty feet from their wharf to which the covenants and restrictions of the indenture could attach.

The plaintiff argues that, by force of the acts authorizing the extensions of the wharves, the dock and common passageway provided for in the indenture of 1830 are extended, with the covenants and restrictions of the indenture relating to them; and that the acts of extension were accepted by the owners of T Wharf subject to that condition. The St. of 1832, c. 51, incorporated the plaintiff as the Commercial Wharf Company and authorized it to hold certain real estate described, which included Commercial Wharf, and to extend the wharf to a certain line in the harbor channel. The real estate it was authorized to hold was bounded easterly "by that part of the harbor channel to which said company is hereby authorized to extend their wharves," and southerly by the common highway in the dock established by the indenture of 1830. The act authorized the extension of the wharf into the harbor or channel as far as a described line, and provided that no wharf should be built in the channel excepting on piles, and parallel with the line of the dock or common passageway established by the indenture of 1830. Similar provisions are in the act authorizing the second extension of Commercial Wharf. St. 1839, c. 25. No other mention is made of the dock or common passageway in any of the acts authorizing extensions of the wharves. The plaintiff never acquired any real estate below low-water mark, except the rights given by the statute authorizing its extension.

The language of the act authorizing the extension of T Wharf (St. 1832, c. 57) is, that it shall be "extended within the lines of said wharf, as it now exists, continued easterly to the limit aforesaid." The first act authorizing the extension of T Wharf contained the proviso that "nothing herein contained shall have the effect to enable said proprietors of said T Wharf, their heirs or assigns, to violate any covenants or engagements they have made or entered into with any person or persons, or bodies corporate, and which are now subsisting, nor to infringe the rights or estates of any person or persons whomsoever." St. 1832, c. 57. The similar provision in the second act for the extension of T Wharf is, that "nothing herein contained shall impair the rights of any other persons whatever." St. 1839, c. 77. The provisions in the acts for the extensions of Commercial Wharf are,

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that "nothing herein contained shall be construed to authorize the said company to lessen or injure the rights or property of the owner or owners of any wharf or wharves adjoining those of said company," (St. 1832, c. 51,) and that "nothing herein contained shall in any way interfere with the legal rights of the owner or owners of any wharf or wharves adjoining that of said company." St. 1839, c. 25. The purpose of all these provisions, which in substance are commonly found in acts of the kind, is to preserve existing covenants, engagements, rights, and estates, not to enlarge them nor to create new ones. The suggestion that these provisions amount to enactments, or conditions, that the dock and common passageway which had been established by the owners of the respective wharves and another party over flats which were their private property, and the mutual covenants and restrictions of the parties relating thereto, should be extended and applied to the public waters between the extended wharves, probably arose from the somewhat peculiar language of the provisions in the first act extending T Wharf. But the language does not indicate the intention, and will not bear the meaning suggested. The other provisions are not capable of such a construction, and to give that meaning to this provision and not to the others, and to hold that the Legislature intended by it to extend the covenants of the owners of T Wharf in regard to the common passageway above low-water mark to the flats below low-water mark, is to find the intention that such covenants and rights, mutual in the indenture, should be extended only in favor of the Commercial Wharf and against T Wharf, and is a construction which cannot be entertained.

The covenants of the indenture do not apply to any flats below low-water mark, and the damages sustained by the plaintiff by the occupation and obstruction of the flats below low-water mark by the occupants of T Wharf are not in consequence of any violation of the covenants of the indenture for which the plaintiff seeks redress. The result is, that the plaintiff is entitled to a decree enjoining the defendants against laying vessels at their wharf within the common passageway, with the exception mentioned in the indenture, westerly of the harbor channel as it was at the time of the indenture. The decree must be settled by a single judge. *Decree for the plaintiff.*

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COMMONWEALTH *vs.* JAMES T. WELLINGTON.

Norfolk. April 2, 1888. — May 3, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Intoxicating Liquors — Possession — Evidence — Intent — Exceptions.

On an indictment for keeping and maintaining a tenement used for the illegal sale of intoxicating liquors, evidence that a druggist, at whose store liquors were seized, had pending at the time an application for a druggist's license under the St. of 1887, c. 431, which was granted five days later, is competent to explain his possession of the liquors, no sale of liquors having been proved.

INDICTMENT, returned into the Superior Court on September 10, 1887, alleging that the defendant kept and maintained a common nuisance, to wit, a tenement in Stoughton, used for the illegal sale and illegal keeping of intoxicating liquors, on January 1, 1887, and on divers other days and times between that day and August 9, 1887. Trial before *Pitman*, J., who, after a verdict of guilty, allowed the following bill of exceptions:

"The government introduced the testimony of three constables of said town of Stoughton, Callahan, Vanston, and Lane, each of whom testified to a seizure of liquors made at the defendant's drug store, in said Stoughton, on the sixteenth day of July, 1887, of rum, gin, and whiskey, in quantities of less than three quarts each, contained in six ordinary druggist's ornamental shelf bottles, and one cocoa wine bottle. The latter was, at the time of seizure, on the prescription case, and the former were on the shelves of the store with other similar bottles, in an ordinarily conspicuous position. In the back room was a keg that had contained whiskey, and a bottle with some ale, and in the cellar a number of empty ale and porter bottles. No other intoxicating liquor was found. It was in testimony that the defendant's store was an ordinary druggist or apothecary store, with the stationery, fancy goods, cigars, medicines, and soda fountain usually found in an ordinary country drug store. The defendant was not present at the time of the seizure. There was also evidence that on the night of the 4th of June, 1887, the defendant and one Roach came out of the back

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door of said store in a state of intoxication; that persons had been seen coming from the shop under the influence of liquor; that persons who came out on the street drank from bottles, and that on two occasions the defendant had been seen to fill bottles from bottles in the store, and give them to customers, and had been seen to conceal from the sight of the officers bottles which he had filled for customers, as the officers stepped in. There was no evidence of a sale of liquor by the defendant. The Commonwealth rested.

"The defendant first called Hiram Blanchard, one of the selectmen of said Stoughton and the clerk of the board, and offered to show by the records of said board of selectmen, that at the time of the seizure said defendant had made application to said board of selectmen for a license of the sixth class under the statutes of 1887, and that five days after the complaint was made, which was the foundation of this indictment, such license was granted to the defendant, and was still in force; but the evidence was excluded by the court. The defendant called one Amasa Lucas, who testified that he lived next door to the defendant's said drug store, and never saw any drunken people go in or out of said store, and never bought or knew of any one else buying liquor of said defendant. Upon cross-examination by the district attorney, he was asked if he had not complained of the place to constable Callahan, to which he replied that he never had, but that he once had some conversation with Callahan alone on the street about the defendant's store. The district attorney asked what the conversation was, to which the defendant objected. The objection was overruled, and the question was put.

"The defendant, among other things, asked the court in charging the jury, to rule that, 'in determining the intent with which the defendant kept liquors which may have been upon his premises, the jury are to consider all the evidence in the case, including the evidence of his purchasing the stock as a whole from his predecessor, the evidence of the officer as to a license, the brief period which elapsed between the date of the finding the liquors and the granting of the license, and the situation in the store in which the liquors seized were kept.' This ruling was given as far as the words 'including the evidence,'

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&c., with the following comment: 'Then follows a recital of evidence, supposed to be favorable to the defendant, which I omit because I am not bound to select any particular parts of the evidence, as the Supreme Court have said, in order to help out an argument for the defendant.' The court also instructed the jury, in regard to the license of the defendant, as follows: 'There was no license at this time, and it is entirely immaterial whether there was a license afterwards, because no man is justified in selling liquor in anticipation of getting a license later on.'"

The case was submitted on briefs.

J. F. Simmons, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

C. ALLEN, J. This case is submitted to us merely on printed briefs, so that we have no opportunity of obtaining from counsel any explanations to aid us in a correct understanding of the bill of exceptions, respecting which we have been somewhat at a loss. The indictment, which was returned into court on September 10, 1887, charged the defendant with having kept a tenement used for the illegal sale and illegal keeping for sale of intoxicating liquors, from January 1, 1887, to August 9, 1887. The defendant kept a drug store. A seizure was made on July 16, 1887, and certain kinds and quantities of liquor were found, and an empty keg which had contained whiskey, and also some empty ale and porter bottles. There was no evidence of a sale. There was other evidence tending to show that the defendant was guilty, but the seizure was also relied on as material and significant evidence tending to establish his guilt; and we must necessarily treat it as important.

The defendant, for the purpose of explaining his possession of liquors at the time of the seizure, offered testimony to show that he had then made an application for a druggist's license, under the St. of 1887, c. 431, which license was granted to him five days after the making of the complaint which was the foundation of this indictment. It is thus to be inferred that there had been such a complaint before a trial justice, though the date of it is not ascertainable from the record before us, and is not absolutely essential. This evidence was excluded. The fact of the subsequent granting of the license could have no other sig-

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nificance than as it might tend to show the defendant's good faith in applying for it, and his reasonable expectation of its being granted. But the defendant contends that the fact that he had pending an application for a druggist's license was competent to be considered by the jury in explanation of the fact of his having the liquors on hand. The application for a license would certainly furnish no good explanation of the empty whiskey keg, or the empty ale and porter bottles; but possibly some other explanation might be given in respect to them. So far as the liquors on hand were concerned, it seems to us that the fact of his application for a license might properly be considered by the jury. Take a strong case. Suppose the defendant had previously had a license, and before its expiration made application for a renewal of it, but a delay happened in the granting of the new license, so that for a few days he had no license. The fact that he had liquors on hand during the interval would properly have less weight against him, if these other facts were shown. The existence of a previous license, which had shortly before expired, or the reasonable expectation of obtaining a license upon an application already made, no actual sale being shown, might have some proper weight in the minds of the jury in determining whether the liquors kept by him were intended for illegal sale.

In the instructions to the jury which were requested, reference is made to "the evidence of the officer as to a license," and this request, and the manner in which the court dealt with it, suggest a doubt whether, after all, evidence was not finally admitted that the defendant obtained a license, and had an application therefor pending at the time of the seizure. We are apprehensive that there may have been some inadvertence in signing the bill of exceptions. But we find nothing stated with sufficient distinctness to relieve us from the necessity of determining the bald question whether evidence of the fact that the defendant had an application for a license pending at the time of the seizure might have a material bearing upon the question of his intent in keeping the liquors. We are of opinion that it was admissible. *Exceptions sustained.*

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COMMONWEALTH *vs.* ANTONIO FUNAI.

Suffolk. April 3, 1888. — May 3, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Intoxicating Liquors — Evidence — Declaration of Wife — Admission of Husband — Exceptions — Waiver.

A declaration by a wife, speaking of a bottle of whiskey on her person, "We will sell liquor in spite of all the officers of Station 1," uttered in the presence of her husband, who was not then under arrest or duress, is competent on a complaint against him, as an implied admission and assertion that both of them were engaged in selling liquor, and that the sale was illegal.

COMPLAINT alleging that the defendant, on November 26, 1887, at Boston, unlawfully exposed and kept for sale intoxicating liquors, with intent unlawfully to sell the same in this Commonwealth. Trial in the Superior Court before *Sherman*, J., who allowed a bill of exceptions, which, so far as material, was as follows.

The evidence tended to prove that the defendant resided with his wife in the same building where there was an eating saloon, and at the date mentioned in the complaint police officers visited the place with a warrant to search for intoxicating liquors; that in the saloon there was a bar or counter, bottles and glasses, &c.; that in a closet back of the counter, under the stairs, after removing a board or trap door, they found twenty-five bottles of lager beer; and that while they were making the search, the defendant and his wife being present, she said, speaking of a bottle of whiskey upon her person, "We will sell liquor in spite of all the officers of Station 1." This declaration of the wife was admitted, against the objection of the defendant.

The defendant requested the judge to rule "that declarations or statements of the wife are not sufficient to warrant a conviction of the husband," and the judge said, "That is so, gentlemen, and her declarations in his presence are only competent as bearing upon the question of his approval or non-approval of the language used by her."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

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W. G. Frye & B. Hall, for the defendant.

A. J. Waterman, Attorney General, for the Commonwealth.

HOLMES, J. The declaration by the defendant's wife, "We will sell liquor in spite of all the officers of Station 1," contained, or might have been found to contain, an implied admission and assertion that she and her husband were engaged in selling liquor, and also that the sale was illegal. Having been uttered in the presence of her husband, and he not having been under arrest or duress at the time, it was some evidence of an admission on his part, if the declaration was understood by him in the sense first mentioned, and if the circumstances were such that according to human experience he naturally would have repudiated it, if the implied assertions were not true. *Commonwealth* v. *Brailey*, 134 Mass. 527, 530. *Commonwealth* v. *Galavan*, 9 Allen, 271. *Commonwealth* v. *Kenney*, 12 Met. 235. *Sturtevant* v. *Wallack*, 141 Mass. 119, 123. Whether the declaration was also admissible on other grounds, we need not consider. *Commonwealth* v. *Ratcliffe*, 130 Mass. 36. *Commonwealth* v. *Locke*, 145 Mass. 401.

The other exceptions are waived. *Commonwealth* v. *McCue*, 121 Mass. 358, 360. *Exceptions overruled.*

COMMONWEALTH *vs.* SARAH J. ROBINSON.

Middlesex. April 2, 1888. — May 3, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Murder — Evidence — Antecedent Acts.

Antecedent acts rendering the commission of a crime easier, safer, more certain, and more effective to accomplish an object, if done with that intention and purpose, are so connected with the crime as to be admissible at the trial of an indictment therefor, although themselves criminal.

It is for the presiding judge at the trial to decide, in the first instance, whether there is proof enough to connect such acts with the crime alleged so as to render evidence thereof admissible, in determining which it is only necessary that there should be so much proof as to make it proper to submit the whole evidence to the jury, and not that he should be satisfied beyond a reasonable doubt.

At the trial of a woman indicted for murder, it appeared that the deceased was insured in a beneficiary association, his wife, who was the prisoner's sister, being

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the beneficiary; that the wife died after an illness of about three weeks; that immediately after her death the insured went to live with the prisoner and duly made her his beneficiary; that he died soon after by arsenic, being ill about six days; and that the prisoner, who from a period prior to the wife's death had been harassed by creditors, received the insurance money, and out of it paid off her debts. To prove a scheme on the prisoner's part to obtain the insurance first through a murder of the wife and then of the husband, evidence was offered that before the wife's death the prisoner knew of the insurance; that during the wife's illness she expressed the opinion that her sister would never recover, saying that she had had a terrible dream, and that when she had such a dream one of the family always died; that before, as well as after, the death of the insured, she expressed a wish to have him live with her, and asked others to urge him to do so; that on the day of the wife's funeral she said that his sister wished him to live with her so as to get the insurance, but that she, the prisoner, had the best right to it and wanted it; that on the same day she asked the insured if the insurance was made over to herself, and afterwards said she was afraid it would not be; that on the day the insured was taken ill, and afterwards, she sent to the association to see if the papers were right, and if she would get the insurance in case anything happened to him; that she was told before his death by the secretary that the papers were all right; and that she asked the secretary not to tell his sister about the insurance. *Held*, that the evidence was sufficient to warrant the introduction of further evidence that the prisoner poisoned the wife.

INDICTMENT for the murder of Prince Arthur Freeman by poisoning. At the trial, before *Field* and *Knowlton*, JJ., there was evidence tending to prove the following facts.

In February, 1885, Freeman occupied a tenement in South Boston with his wife, Annie Freeman, who was a sister of the defendant, and their two children. On February 20, 1885, the defendant called upon her sister, staying but a short time, and on February 23, 1885, again went to her sister's house to take care of her, and there stayed until Mrs. Freeman died, on February 26, 1885, after an illness of about three weeks. The children had been taken to the defendant's house in Cambridge on February 22, and, immediately after the death of his wife, Freeman went to live with the defendant, and there remained, with his children, one of whom died in April, 1885. In 1882 Freeman took out a certificate of insurance for $2,000 in the United Order of Pilgrim Fathers, his wife being the beneficiary named in the certificate, and after her death, on or about May 13, 1885, appointed the defendant his beneficiary under the certificate, as authorized by the by-laws of the order. Freeman, while still an inmate of the defendant's family, died, on June 27, 1885, after an illness of about six days, from the effects of arsenic

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administered to him by the defendant. From a period prior to 1885, the defendant had been indebted to different persons to the amount of six or seven hundred dollars, which she was unable to pay, and for which she had been hard pressed by her creditors, and this indebtedness she paid off out of Freeman's insurance, which she duly received from the order on September 23, 1885.

The government contended — and offered, for the sole purpose of establishing the defendant's motive in killing Freeman, evidence to prove — that prior to the death of Annie Freeman the defendant had formed the plan and intention of securing to her own use the $2,000 of insurance, and as a means of accomplishing this result, and as a part of the scheme, determined first to kill her, then to induce Freeman to make her the beneficiary under the certificate, and then to kill him. Upon this offer the court ruled as follows: "If evidence direct or circumstantial is offered and admitted tending to show that this defendant knew before her sister's death of the existence of the insurance, and that it could be transferred on the death of her sister to herself, and made payable to herself on the death of her brother-in-law, and that she before her sister's death had formed in her own mind a plan or intention to obtain this insurance for her own benefit, and this plan or intention continued to exist and be operative up to the time of the death of the brother-in-law, then we are of the opinion that evidence may be offered that her sister died of poison, and that this defendant administered it as a part of the method employed by her to carry this plan or intention into effect, in connection with evidence that she administered poison to her brother-in-law as another part of the same plan or intention. We think that evidence of this knowledge and plan or intention on the part of the defendant, if there be any, should first be offered, that the court may judge whether it is sufficient to warrant the introduction of evidence that the sister died of poison administered by the defendant."

The government thereupon offered evidence to prove such a scheme on the part of the defendant, which was admitted. This contention of the government, and offer of evidence of the alleged scheme and intention of the defendant, the arguments of counsel, and the above ruling of the court thereon, were all made in open

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court, in the presence of the defendant, but in the absence of the jury. The evidence so far as material was as follows.

Susan S. Marshall testified that the defendant remarked to her that Prince Arthur Freeman was insured in or had joined the order about the time he joined it in 1882; that during the sickness of Mrs. Freeman, at the defendant's request, she assisted in taking care of her; that while she was there the defendant expressed the opinion that Mrs. Freeman would not live; and that immediately after Mrs. Freeman's death the defendant requested her to use her influence with Freeman to take his children and come to live with her.

Mrs. Mary J. Wright testified that she lived in the same house with Mrs. Freeman in South Boston at the time of her death; that she frequently saw the defendant while she was taking care of her sister; that she frequently heard the defendant say, before her sister's death, that she was satisfied her sister would never recover; that on one occasion the defendant said that she had had a terrible dream, and that she knew her sister would never get any better, as whenever she had a dream like that there was always one of the family died, and that she knew her sister would never recover; that at the time the defendant came, Mrs. Freeman seemed to be getting better, when, all at once, she seemed to sink very fast; that the defendant asked her, before and after Mrs. Freeman's death, to use her influence with Freeman to come and live with her with the children after her death; that on one occasion the defendant requested Freeman to go into the chamber where his wife was, and when she came out she said, "There, I have fixed it all right now, — any little rings, or anything that Annie has, I have had distributed so that there will be no trouble if anything should happen to her, and the children are to come to me"; and that the defendant expressed the opinion that Mrs. Freeman would not recover, and within a day or two after she came to take care of her said to various persons who came in that her sister would never recover.

Mary L. Moore testified that on three occasions during Mrs. Freeman's sickness, and while the defendant was there, she took care of her during the night; that the defendant did not seem to think her sister would recover; that the defendant desired her to use her influence with Freeman to come and live with her

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after his wife's death; that Freeman's life was insured, and that it was in her sister's name; and that after Mrs. Freeman's death the defendant told her that the Freemans were going to live with her, and that she did not wish them to live with his relatives.

Belle M. Clough testified, that she was an intimate friend of the defendant's family; that she attended the funeral of Mrs. Freeman at South Boston, and returned in a carriage with the defendant from the cemetery; that on the way she had a conversation with the defendant about the insurance, and the Freemans living with her; that the defendant said she wished them to live with her, but that Mrs. Melvin, a sister of Freeman, was very anxious to have him live with her; that the defendant said that all Mrs. Melvin wanted was to get the insurance made over to her, but that she had the best right to it, and it was her sister's request that it should be made over to her, and she wanted it; that the defendant said that she had requested her daughter to use all her influence upon her uncle to go and live with them, as her daughter had a great deal of influence over him; that at the supper after the funeral at Freeman's house, the defendant had a conversation with him about the insurance; that she was very anxious to have him come as soon as possible to her house to live, and he said that he would come just as soon as he could get the things at the house straightened out; that the defendant wanted to know if the insurance was made over to her, and he said it was not, but should be; that the defendant said that his mother and sister were anxious to have him come with them now that they saw he had an insurance, but before that they did not care anything about him; that the subject of insurance was afterwards quite frequently spoken of by the defendant, who said that she was afraid that Freeman would not make the insurance over to her; that he was going over to his folks every Sunday, and she thought they had a good deal of influence over him, as he had changed considerably, and was not as pleasant at the house with her; that on the evening that Freeman was taken sick, June 22, the defendant asked the witness to go over to Boston with the defendant's daughter, to a colony of the order of which he was a member, to see if all the papers were right in case anything happened to him, whether the defendant

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would get the insurance, and if all the assessments were paid up; that the defendant sent over to see about the insurance once or twice afterwards before his death; and that some time after Freeman's death the defendant said that the insurance was made over to her to take care of the child, and that after she had paid all of Freeman's bills there was very little left for the boy.

Florence A. Stanwood testified, that she was secretary of the colony of which Freeman was a member, and went over to the defendant's house the day before Freeman's death, because of a message from her daughter and the witness Clough; that there was a conversation about the insurance in the presence of the defendant and Freeman; that she informed them that the papers were all right; that after the interview the defendant went with her into the parlor, and there requested her not to tell about the insurance; and that the defendant said that Mrs. Melvin, as soon as there was some money coming, would want to take care of the children for the sake of it.

William Foster testified, that he was at the defendant's on the day of Mrs. Freeman's death, and had a conversation with the defendant, who said that there was an insurance of two thousand dollars in the colony of the Pilgrim Fathers, and that the insurance had been made over to her; that she would not have taken Freeman if the insurance had not been made over to her; that probably Freeman's friends would want the insurance papers, but that she did not think they would find them, for they had been put away where she thought they would be unable to get them.

The government offered evidence tending to prove the death of Annie Freeman by arsenic, knowingly administered by the defendant.

The defendant objected to the admission of this evidence, on the ground that no evidence, and no sufficient evidence, had been offered to prove the alleged scheme and intention of the defendant; that no sufficient foundation had been laid for the introduction of any evidence relating to the cause of the death of Annie Freeman, or the defendant's connection therewith; and that it was not competent, notwithstanding any evidence of the scheme or intention, to prove the cause of the death of Annie

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Freeman, or the defendant's connection therewith; but the court overruled the objection, and admitted the evidence.

The court ruled, and instructed the jury, that, upon a trial of a defendant for the commission of a crime, evidence that at another time he committed a similar crime could not be received or considered as tending to show that he committed the crime for which he was on trial; that evidence tending to show that the defendant killed her sister, Annie Freeman, was not to be considered as indicating that she would be likely to kill Prince Arthur Freeman; and that all the evidence in relation to the death of Annie Freeman was only to be considered so far as it bore upon the question whether the defendant, at the time of the alleged murder of Prince Arthur Freeman, was actuated by the motive which was imputed to her by the Commonwealth, to obtain for her own use the life insurance money payable on his death.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. B. Goodrich & D. F. Crane, for the defendant.

A. J. Waterman, Attorney General, (*H. C. Bliss*, Assistant Attorney General with him,) for the Commonwealth.

C. ALLEN, J. We have given to this case a degree of attention commensurate with its importance, and have come to the conclusion that there was no error in the conduct of the trial.

While it is well settled in this Commonwealth, that, on the trial of an indictment, the government cannot be allowed to prove other independent crimes for the purpose of showing that the defendant is wicked enough to commit the crime on trial, this rule does not extend so far as to exclude evidence of acts or crimes which are shown to have been committed as part of the same common purpose, or in pursuance of it. *Commonwealth* v. *Jackson*, 132 Mass. 16, 18. *Commonwealth* v. *Blood*, 141 Mass. 571, 575. In such cases there is a distinct and significant probative effect, resulting from the continuance of the same plan or scheme, and from the doing of other acts in pursuance thereof. It is somewhat of the nature of threats or declarations of intention, but more especially of preparations for the commission of the crime which is the subject of the indictment. If, for example, it could be shown that a defendant had formed a settled

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purpose to obtain certain property, which could only be got by doing several preliminary things, the last of which in the order of time was criminal, the government might show, on his trial for the commission of that last criminal act, that he had formed the purpose to accomplish the result of obtaining the property, and that he had done all of the preliminary things which were necessary to that end. This would be quite plain if the evidence of the purpose were direct and clear; as if a letter in the defendant's handwriting should be discovered, stating in terms to a confederate his purpose to obtain the property by the doing of the several successive acts, the last of which was the criminal act on trial. In such case, no one would question that proof might be offered that the defendant had done all the preliminary acts referred to, which were necessary steps in the accomplishment of his purpose. But such purpose may also be shown by circumstantial evidence. It is, indeed, usually the case, that intentions, plans, purposes, can only be shown in this way. Express declarations of intention, or confessions, are comparatively rare; and therefore all the circumstances of the defendant's situation, conduct, speech, silence, motives, may be considered. The plan itself, and the acts done in pursuance of it, may all be proved by circumstantial evidence, if they are of themselves relevant and material to the case on trial. And in such a case it makes no difference whether the preliminary acts are criminal or not; otherwise, the greater the criminal, the greater his immunity. Such preliminary acts are not competent because they are criminal, but because they are relevant to the issue on trial; and the fact that they are criminal does not render them irrelevant. Suppose, for further example, one is charged with breaking a bank, and there is evidence that he had made preliminary examinations from a neighboring room; the fact that his occupation of such room was accomplished by a criminal breaking and entering would not render the evidence incompetent. It is sometimes said that such evidence may be introduced where the several crimes form part of one entire transaction; but it is perhaps better to say, where they have some connection with each other, as a part of the same plan, or induced by the same motive. Precedent acts which render the commission of the crime charged more easy, more safe, more

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certain, more effective to produce the ultimate result which formed the general motive and inducement, if done with that intention and purpose, have such a connection with the crime charged as to be admissible, though they are also of themselves criminal.

We do not understand that this general view, stated thus, is distinctly controverted by the counsel for the prisoner, and it is supported by a great number of decisions, only a few of which are here cited. *Commonwealth* v. *Scott*, 123 Mass. 222. *Commonwealth* v. *Choate*, 105 Mass. 451. *Swan* v. *Commonwealth*, 104 Penn. St. 218. *Goersen* v. *Commonwealth*, 99 Penn. St. 388. *Shaffner* v. *Commonwealth*, 72 Penn. St. 60. *Mayer* v. *People*, 80 N. Y. 364, 375. See also *Jordan* v. *Osgood*, 109 Mass. 457. For cases where such connection was not shown, but where the principle was recognized, see *Commonwealth* v. *Jackson*, 132 Mass. 16; *State* v. *Lapage*, 57 N. H. 245, 295; *People* v. *Sharp* (opinion by Peckham, J.), 107 N. Y. 427, 466.

The ruling at the trial, therefore, was correct, that if evidence should be offered and admitted tending to show that the prisoner knew before her sister's death of the existence of the insurance, and that it could be transferred on the death of her sister to herself, and made payable to herself on the death of Freeman, and that before her sister's death she had formed a plan or intention to obtain this insurance for her own benefit, and this plan or intention continued to exist or be operative up to the time of Freeman's death, then that evidence might be offered to show that her sister died of poison, and that the prisoner administered it as a part of the method employed by her to carry this plan or intention into effect, in connection with evidence that she administered poison to Freeman as another part of the same plan and with the same general intention. The court therefore properly held that evidence of this knowledge and plan or intention on the part of the prisoner should first be offered, that the court might judge whether it was sufficient to warrant the introduction of evidence that the sister died of poison administered by the prisoner. This claim and offer of proof on the part of the government, and the arguments of counsel, and the said ruling of the court thereon, were all made in open court, in the prisoner's presence, but in the absence of the jury.

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The government accordingly proceeded to introduce, with its other evidence to the jury, certain testimony in support of said alleged scheme or intention on the part of the prisoner, which is recited in the bill of exceptions; and after said testimony had been received, it offered evidence tending to prove the death of the prisoner's sister by arsenic, knowingly administered by the prisoner. This evidence was objected to, on the ground that no sufficient evidence had been offered in proof of said alleged scheme or intention, and on other grounds; but the court overruled the objection, and admitted the evidence, subject to the prisoner's exception.

In seeking a new trial on account of the admission of this testimony, the argument of the prisoner's counsel, briefly stated, is as follows: Preliminary evidence must be given to show that the acts offered to be proved were done in pursuance and as a part of some plan or scheme to accomplish the particular result; it is the exclusive province of the court to determine if such evidence is sufficient; the decision of the court, admitting the evidence, is subject to revision in the present case, the testimony upon which that decision was founded having been reported for the purpose; it is not enough that there was some evidence, but the preliminary evidence must amount to proof; the ruling of the court did not expressly affirm the necessity of such proof, that is, as we understand the argument, the necessity of such amount or degree of proof; and, finally, this court, upon a revision of the preliminary evidence reported, should now hold that it was not sufficient to warrant the introduction of evidence to show that the prisoner poisoned her sister, Mrs. Freeman. The last three of these propositions are the only ones which need any further attention.

A consideration of the nature of the question which is presented to the court, when it is called upon to decide upon a preliminary question of fact, in order to determine whether offered evidence shall be received, will show that its determination reaches no further than merely to decide whether the evidence may or may not go to the jury. The decision upon this particular question of the admissibility of the evidence is ordinarily conclusive, unless the judge sees fit to reserve or report the question for future revision. *Dole* v. *Thurlow*, 12

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Met. 157. *Gorton* v. *Hadsell*, 9 Cush. 508, 511. *O'Connor* v. *Hallinan*, 103 Mass. 547. *Walker* v. *Curtis*, 116 Mass. 98. And in this respect the rule is the same in criminal cases. *Commonwealth* v. *Hills*, 10 Cush. 530. *Commonwealth* v. *Mullins*, 2 Allen, 295. *Commonwealth* v. *Morrell*, 99 Mass. 542. *Commonwealth* v. *Culver*, 126 Mass. 464. *Commonwealth* v. *Gray*, 129 Mass. 474.

But where, in a case like the present, the admissibility of testimony depends upon the determination of some prior fact by the court, there is no rule of law that, in order to render the testimony admissible, such prior fact must be established by a weight of evidence which will amount to a demonstration, and shut out all doubt or question of its existence. It is only necessary that there should be so much evidence as to make it proper to submit the whole evidence to the jury. The fact of the admission of the evidence by the judge does not in a legal sense give it any greater weight with the jury; it does not affect the burden of proof, or change the duty of the jury in weighing the whole evidence. They must still be satisfied, in a criminal case, upon the whole evidence, beyond a reasonable doubt. Ordinarily, questions of fact are exclusively for the jury, and questions of law for the court. But when, in order to pass upon the admissibility of evidence, the determination of a preliminary question of fact is necessary, the court in the due and orderly course of the trial must necessarily determine it, as far as is necessary for that purpose, and usually without the assistance, at that stage, of the jury. If, under such circumstances, testimony is admitted against a party's objection, it may often happen that he may still ask the jury to disregard it.

Numerous illustrations of the foregoing view might be given, but a few must suffice us. In an indictment for murder, where the question was as to the admissibility of certain statements in the nature of confessions, which were objected to as having been obtained by means of inducements, it was held by this court as follows: "When a confession is offered in a criminal case, and the defendant objects that he was induced to make it by threats or promises, it necessarily devolves upon the court to determine the preliminary question whether such inducements are shown. . . . . If the presiding judge is satisfied that there were such

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inducements, the confession is to be rejected; if he is not satisfied, the evidence is admitted. But if there is any conflict of testimony or room for doubt, the court will submit this question to the jury with instructions that if they are satisfied that there were such inducements, they shall disregard and reject the confession." *Commonwealth* v. *Piper*, 120 Mass. 185, 188. Similar questions arise when it is objected that a witness is not of sufficient capacity to testify intelligently; or that a third person, whose declarations or acts are offered in evidence against a party, was not a partner, agent, or co-conspirator, and did not stand in such a relation as to make his declarations or acts admissible; and in other cases.

In *Commonwealth* v. *Brown*, 14 Gray, 419, which was an indictment for causing the death of a woman by means of an attempt to procure a miscarriage, the judge at the trial decided, as matter of fact, on the preliminary question, that there was *prima facie* evidence that the defendant and two other persons were jointly acting in combination and concert, and aiding and assisting each other in carrying out a common enterprise of procuring an abortion, so as to make the acts and declarations of those two persons competent, and admitted the evidence; and then left the question to be determined by the jury whether they were acting in concert with the defendant or not, with instructions that, if so, the acts and declarations might be considered by them, otherwise not. This course was held by this court to be correct (pp. 425, 426, 432); the court saying, "The conspiracy of the parties was first satisfactorily made to appear to the court." In *Commonwealth* v. *Crowninshield*, 10 Pick. 497, a similar doctrine was held.

In all such cases, the court, in deciding to admit the offered testimony, does no more than to hold that enough has been shown to make it proper to submit the testimony to the jury, leaving its weight and credit for their determination. The decision of the judge does not relieve the party offering the testimony from the necessity of establishing every material fact to the satisfaction of the jury. See also *Commonwealth* v. *Scott*, 123 Mass. 222, 235; *Commonwealth* v. *Waterman*, 122 Mass. 43, 59; *Commonwealth* v. *Preece*, 140 Mass. 276; *Ormsby* v. *People*, 53 N. Y. 472; *Swan* v. *Commonwealth*, 104 Penn. St. 218.

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1 Greenl. Ev. §§ 49, 111. Steph. Ev. (Chase's ed.) art. 4. In this view of the law, it was not necessary that the court should find that the preliminary evidence amounted to full proof, beyond a reasonable doubt, that the prisoner poisoned her sister in pursuance of a general plan or scheme, in which the poisoning of Mr. Freeman was a later step.

We are further of the opinion, that the preliminary evidence which was before the court was sufficient to warrant the introduction of evidence to show that the prisoner poisoned her sister, Mrs. Freeman. Certain facts were not in dispute. Prince Arthur Freeman, the person whom the prisoner was charged in the indictment with having poisoned, held a certificate of membership in a society which provided for the payment of $2,000 upon his death to the beneficiary named therein, with a power of substitution; his wife, who was the prisoner's sister, was named as beneficiary; she died on February 26, 1885, after an illness of about three weeks; the prisoner called at Freeman's house in South Boston on February 20th, and on February 23d went there to take care of Mrs. Freeman, and stayed till her death; immediately after Mrs. Freeman's death, Mr. Freeman, with his two children, went to live with the prisoner at her house in Cambridge; one of the children died in April; on or about May 13th, Mr. Freeman appointed the prisoner as beneficiary under the certificate of membership; he died on June 27th, after an illness of about six days, from arsenic; the prisoner, on September 23, 1885, received $2,000 from the society upon said certificate. Prior to 1885 the prisoner was owing several hundred dollars, which she was unable to pay, and for which she was hard pressed by her creditors, and which she paid out of the $2,000 so received by her.

As tending to prove the plan or scheme on her part to obtain this life insurance money through the murder of Mrs. Freeman, and then of Mr. Freeman, there was evidence to the effect that before Mrs. Freeman's death the prisoner knew of the certificate of membership insuring Mr. Freeman for his wife's benefit; that during Mrs. Freeman's illness the prisoner expressed the opinion that her sister would never recover, and said that she (the prisoner) had had a terrible dream, and whenever she had a dream like that one of the family always died; that before, as well as

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after, Mrs. Freeman's death, the prisoner expressed the wish to have Mr. Freeman with his children come and live with her, and asked different persons to urge him to do so; that on the day of Mrs. Freeman's funeral the prisoner said that Mr. Freeman's sister, Mrs. Melvin, was very anxious to have him live with her, and that all Mrs. Melvin wanted was to get the insurance made over to her, but the prisoner said she herself had the best right to it, and it was her sister's request that it should be made over to her, and she wanted it; that on the same day she talked with Mr. Freeman about the insurance, wanted to know if it was made over to her, and he said it was not, but should be; that quite frequently afterward she said she was afraid he would not make it over to her; that on June 22d, the same day when he was taken sick (which was after it had been made over to her), she sent to the society to see if the papers were right, in case anything happened to Mr. Freeman, and whether she would get the insurance, and to see that all assessments were paid up; that the appointment for the money to be payable to her was recorded in the books of the society not earlier than June 23d; that she also sent over to see about the insurance once or twice afterwards, before his death, and had an interview with the secretary of the society upon the same subject in Mr. Freeman's presence, the day before his death, and was told that the papers were all right, and afterwards, when not in his presence, requested the secretary not to tell Mr. Freeman's sister about the insurance. This evidence certainly tended to show a scheme and plan, entered into before Mrs. Freeman's death, to have the insurance money made payable to the prisoner. *Exceptions overruled.*

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FRANK T. KELLEY & others *vs.* AARON N. SALTMARSH & others.

Essex. April 3, 1888. — May 3, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Deed — Right of Way — Change of Grade — Support — Extrinsic Evidence.

Under a deed of the fee to the centre of a private way as laid out on a plan, and of a right of way over it, subject to a like right in the grantor, the latter has no right to cut down the grade of the way to the injury of the grantee; and evidence of an oral agreement conferring such a right is inadmissible.

BILL IN EQUITY to restrain the defendants from cutting down the grade, eight or ten feet, of a private way, called Myrtle Street, in Haverhill. The case was heard on a master's report, and exceptions thereto, by *C. Allen*, J., who ordered a decree for the plaintiffs; and the defendants appealed to the full court. The facts appear in the opinion.

J. P. Jones & S. L. Whipple, for the defendants.

I. A. Abbott, for the plaintiffs.

MORTON, C. J. The defendants, being the equitable owners of a large tract of land, laid it out in streets and lots, delineated on a plan. One of the streets was Myrtle Street, twenty-five feet wide. They sold to the plaintiffs respectively lots on Myrtle Street, by deeds in which the boundaries ran to Myrtle Street, and thence by Myrtle Street to monuments named. These deeds conveyed to the plaintiffs respectively the right of way over Myrtle Street as laid out, and also the fee to the centre of the street, subject to the right of way in the defendants and their grantees. *Peck* v. *Denniston*, 121 Mass. 17.

As is stated in *Killion* v. *Kelley*, 120 Mass. 47, where there are several owners in common of a private way, each owner may make reasonable improvements and repairs which do not injuriously affect his co-owners, but he cannot make any alteration of the course of the way, or any change in its grade or surface which makes it less convenient and useful to any one who has an equal right in the way.

In the case at bar, the defendants have the right to level and work the surface of the way so as to make it convenient and

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practicable as a way, so far as they can do so without injuring the plaintiffs or the other co-owners of the way. But they have no right to cut down the grade, as they propose to do, eight or ten feet. The master has found that this would materially injure the plaintiffs' lots, and endanger their buildings, unless proper support is furnished to the soil of the plaintiffs. Even if such support is furnished, yet it would make a material change in the way and diminish the convenience of the plaintiffs in the use of their rights of way. The plaintiffs cannot be compelled to submit to such a change of their rights against their wills. *Killion* v. *Kelley*, *ubi supra*. *Meehan* v. *Barry*, 97 Mass. 447.

Such being the rights of the parties under the deeds, it was not competent for the defendants to prove a previous or contemporary oral agreement that they should have the right to cut down the grade of Myrtle Street eight or ten feet. The deeds to the plaintiffs were made by William Hale, but he was acting merely as the trustee or agent of the defendants, who alone were beneficially interested, and they are to be regarded in the same light as if the deeds were made directly by them. There is no ambiguity in the deeds which calls for oral testimony to explain them. The rights of the parties under them are clear. The deeds settle their rights, and it is not competent for the defendants to enlarge their rights, or to restrict or limit the grant to the plaintiffs by proof of an oral agreement made before or at the time the deeds were made. *Miller* v. *Washburn*, 117 Mass. 371.

Decree affirmed.

JOHN MOYNIHAN *vs.* HILLS COMPANY.

Hampshire. September 28, 29, 1887. — May 4, 1888.

Present: MORTON, C. J., FIELD, DEVENS, W. ALLEN, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Master and Servant — Negligence — Due Care — Fellow Servant — Personal Injuries.

Evidence that a servant, while properly using a machine, not known to him to be out of repair, was injured by the breaking of an iron rod thereon, the break not appearing to be a fresh one, and that the master had caused the rod, which had been used for nearly two years without inspection and was subjected to a strain

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tending to make it brittle, to carry double the weight placed on it by the maker of the machine, warrants a finding that the servant was in the exercise of due care, and that the master was guilty of negligence.

If a master, who is not a mechanic and who has no practical knowledge of machinery, intrusts the reconstruction of a machine to a machinist in his employment, to adapt it to a new use, tells him to act according to his own judgment in so doing, and directs him to take charge of it when done, and to repair it when necessary, the negligence of such machinist is imputable to the master.

TORT for personal injuries sustained by the plaintiff, on May 10, 1884, while in the defendant's employment. At the trial in the Superior Court, before *Barker*, J., there was evidence tending to prove the following facts.

The defendant, a corporation engaged in the business of manufacturing and finishing straw hats, in 1880, purchased, upon the recommendation of its superintendent, new machinery, to be operated by steam power, for pressing the crowns of hats, from a manufacturer of such machinery in Norwalk, Connecticut. The defendant's officers were not mechanics, and had no practical knowledge of machinery. Each of these machines was constructed with a ball suspended upon a rod, and weighing one hundred and thirteen pounds, which acted as a counterbalance to that portion of it called the dome, by which the pressing was done, and which weighed about six hundred pounds. In 1882 or 1883 the defendant caused four of the machines to be rebuilt, so as to press the brims of hats as well as the crowns at the same time. The dome in each was made larger and heavier in order to accomplish this, and the counterbalancing weight was increased by placing another ball of equal weight upon the rod already in use in each machine. Mitchell Marcil, a competent and skilful machinist, had charge of the defendant's machinery, and was given the entire charge by it of the reconstruction of the four machines, having for that purpose three assistants. The machines were set up on a bench, through which the weights passed vertically while they were in operation. The weights in passing up and down acquired a pendulum motion, the weights sometimes striking the side of the building and the floor, wearing away a portion of each, and the rods striking certain iron pipes along the side of the building. The blows so received by the weights and the rods themselves had a tendency to cause a rod of iron so situated to take on a crystalline structure and become

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brittle, the proper method of preventing which was by annealing the rod from time to time.

On May 10, 1884, the plaintiff, who was twenty-seven years old, was pressing hats upon one of the reconstructed machines in a usual and proper manner, when the rod sustaining the weights on it broke, and let the dome down upon the plaintiff's hand and wrist, crushing the bones, so that it became necessary to amputate the hand. Prior to the accident, the plaintiff had worked upon the different hat-pressing machines more or less for three years, and had some knowledge of their construction and operation, and the danger attending the use of them, but he had not worked on the machine in question for more than a month, and had no knowledge that it was out of repair. The rod broke at a point that was slightly discolored, as if it were not a fresh break, and as if there had been a flaw there. The rods in the four machines were examined, at the time of the reconstruction, by an assistant of Marcil, and they were examined again in January, 1883, when an extra nut was put upon each rod below the weights; but there was no inspection of them at any time by Marcil.

Albion F. Bemis testified that he was the defendant's secretary and treasurer, its superintendent, and a director; that there were three directors, neither of whom was a machinist; that he had no practical knowledge of the use of tools and machinery; that he had not examined the rod prior to the accident; that Marcil was the defendant's general machinist, and had charge of the machinery; that he was called upon to do any work that required a machinist, and was directed to see what needed to be done, and to do it; that supplies, tools, and proper material were furnished to keep all these machines in proper condition; that Marcil "had charge of the building these machines, fixing them over"; that "the matter of changing them over was intrusted entirely to" Marcil; that Marcil "was left to do the fitting up of that machine on his own judgment." As to the broken rod he testified as follows: "I saw both parts where it broke; I saw it again in the office before I sent Walker, the clerk, to the blacksmith shop, relative to getting another rod to keep the press running; as I remember it, it was a break nearly straight across; it appeared to me it was not of equal brightness all the way across, as though there had been a check there, or

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something of that sort; it broke very nearly square across; as I remember it, there was a slight discoloration there, as though there had been a flaw; it was slightly discolored, as if it was not a fresh break. I don't think it was very noticeable; it was not a black spot, but it appeared to me as though the iron had not freshly parted. . . . . My attention was particularly called to the break, but I did not notice anything outside of that; of course I must have looked the rod over at the time, but my attention was mainly directed to the break. I examined each end; it appeared dull or cloudy like; it seemed to me as though there had been a flaw or check there, or something of that sort."

Marcil testified that he was the defendant's head machinist; that he had worked as a machinist at different places for about twenty four years; that he was placed in charge of the defendant's machinery; that the hat-pressing machines were used at first without success, and that he thought that he could make a success of them, and could fix them, and was told so to do; that it took him about four weeks, after he got the castings and various parts, to rebuild the machines, with the assistance of three men; that the balls were placed on the machines to counterbalance the dome; that he never weighed the balls, but thought that the rods on which they were placed were strong enough; that the rods looked all alike to him, and he thought they were safe; that at the time he set up the machines he noticed the rod which broke only long enough to put on the balls and nuts; that he must have handled the rod at that time; that he saw no appearance of any defect whatever; and that none of the rods in the other machines had broken that he knew of. On cross-examination he testified: "I did not put this machine together the first time; I did not notice this rod at any time; I did not notice it the second time any more than to put it on; I did not inspect it; I did not accustom myself to look this machine over, any more than when I got it done I thought it was all right; when I got it done I did not look at it again until the time of the accident; I do not remember ever inspecting that rod from the time it was set up until the day Moynihan was hurt; I do not remember having any instruction from Bemis about it in any way whatever; I do not believe I ever noticed that hole in the floor until after Moynihan was hurt; I do not remember as

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I ever noticed about the flaw until after Moynihan was hurt; I do not remember as I ever noticed the worn spot on the side of the rod; I do not remember as I ever noticed the wearing on the floor or on the watet pipe; I do not remember about the wall; I never was instructed to go through that room and inspect the machines, only when they come to tell me something give out."

The defendant asked the judge to rule, that on the evidence the plaintiff was not entitled to recover; that there was no evidence that Marcil was not a competent man for the defendant to employ and intrust with the reconstruction and repair of the machine; that the defendant was not negligent in so employing him and so intrusting him; and that if the accident happened by reason of the negligence of Marcil, the plaintiff could not recover.

The judge declined so to rule, but instructed the jury that there was evidence tending to show that Marcil was employed by the defendant in order to make repairs and reconstruct the machine; that there was evidence that he was an experienced and skilful mechanic, and no evidence tended to show that he was otherwise; that upon the evidence the defendant was not negligent in intrusting to him the repairs and reconstruction of the machines; that it was a question of fact for them to decide, whether Marcil was negligent in making those repairs and in reconstructing this machine; and that if Marcil was negligent, then his negligence would not be that of a fellow servant, but of the defendant, for which the defendant would be answerable if such negligence was the sole cause of the injury.

The jury returned a verdict for the plaintiff for $4,125; and the defendant alleged exceptions. The case was argued at the bar in September, 1887, and afterwards was submitted on briefs to all the judges.

D. W. Bond & J. I. Cooper, for the defendant.

J. C. Hammond, for the plaintiff.

KNOWLTON, J. The defendant's request for a ruling that upon the evidence the plaintiff was not entitled to recover, was rightly refused. There was testimony tending to show that the plaintiff was using the machine in a proper manner, and that he did not know it was out of repair. This would warrant a find-

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ing that he was in the exercise of due care. The fact that the machine broke, in the manner described, from the use for which it was intended, was evidence that it was defective and unsafe, and the fact that the defendant was then using it in its business, if left unexplained, was some evidence of the defendant's negligence. *White* v. *Boston & Albany Railroad*, 144 Mass. 404. But, beyond that, it was proved that the rod which broke was designed to carry one iron ball weighing about one hundred and thirteen pounds, and that under the defendant's direction the machine had been reconstructed, and the rod made to carry two such balls. There was also testimony that it had been subjected to a use which caused the iron in the rod to vibrate while under a strain, and which tended to crystallize it and make it brittle, and that there had been no inspection of it to ascertain its condition for nearly two years before the accident. The defendant's secretary and treasurer, who was also its superintendent and one of its directors, testified that the rod was slightly discolored at the place of the fracture, as if the break was not fresh, and that it appeared to him as if the iron had not freshly parted. Upon this evidence it was for the jury to decide whether or not the defendant was negligent.

The court was also requested to rule, that, if the accident happened by reason of negligence of Marcil, the plaintiff could not recover. This ruling was refused, and the jury were instructed that negligence of Marcil in making the repairs and reconstructing the machine would be negligence of the corporation, for which the corporation would be answerable if it was the sole cause of the injury. The principal question in the case is whether or not this instruction was correct.

The rights of a plaintiff who has been injured by defective machinery of a defendant for whom he was working, depend upon the contract, express or implied, under which he was employed. In making a contract for service, if the business is to be carried on by many persons working together in a factory, the parties naturally contemplate the existence of machinery, tools, and appliances, and the presence of other employees, who will be fellow servants of him who is contracting to serve. In the absence of an express stipulation, the master impliedly agrees to provide and maintain reasonably safe and suitable machinery and appliances,

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so far as the exercise of proper care on his part will secure them, and the servant agrees to assume all the ordinary risks of the business, and among them the risk of injury from negligence of his fellow servants. This obligation which the master assumes is personal, and pertains to him in his relation to the business as proprietor, and in his relation to the servant as master. It has been repeatedly held that he cannot discharge it by delegating the performance of his duty to another. *Ford* v. *Fitchburg Railroad*, 110 Mass. 240. *Kelley* v. *Norcross*, 121 Mass. 508. *Killea* v. *Faxon*, 125 Mass. 485. *Elmer* v. *Locke*, 135 Mass. 575. *Lawless* v. *Connecticut River Railroad*, 136 Mass. 1. *Flike* v. *Boston & Albany Railroad*, 53 N. Y. 549. *Hough* v. *Railway*, 100 U. S. 213. And if he employs agents or servants to represent him in the performance of this duty, they are to that extent agents or servants for whose conduct he is responsible.

The very nature of the implied contract created by the hiring, whereby he undertakes to use proper care in always providing safe tools and appliances, is inconsistent with his delegation of the duty to a fellow servant, for whose negligence he is not to be responsible. His obligation involves the exercise of every kind of care and diligence which is necessary to give him knowledge of the condition as to safety of his machinery and appliances, so far as such knowledge is obtainable by reasonable effort. His duty relates to the condition of these articles when they come to the hands of his servants for use, and the performance of that duty must carry him just so far into details as it is reasonably necessary to go, in view of the nature and risks of the business, to enable him reasonably to protect his servants from a danger which he should prevent.

It is obvious that difficult questions arise in cases of this kind in determining the implied obligations of the respective parties under peculiar circumstances. In many kinds of business the condition of a machine as to safety is constantly changing with the use of it, and it is safe or unsafe at a given moment according as it is properly or improperly used and managed by the servant who operates it. Moreover, certain kinds of repairs can be conveniently and properly made, under direction and supervision, by servants regularly employed in the business. In such cases both parties to the contract of service must be presumed

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to have contemplated that, to a certain extent, fellow servants would be employed by the master to do work in keeping the machinery safe. Work negligently done within that field, if an accident should happen from it, would seem at first to introduce a conflict between the obligation of the master to hold himself liable for want of due care in keeping his machinery safe, and the obligation of the servant not to claim damages resulting from negligence of a fellow servant. It becomes necessary therefore to consider the rights of the parties in such cases. The application, in each particular case, of any general rules which may be laid down will involve a consideration of two questions of fact: First, what is the nature and character of the business, and the usual and proper general method of conducting it? Secondly, in such a business, what is reasonably necessary to be done on the part of the master to secure for the use of the workmen machinery and appliances which will always be reasonably safe?

First, there is that class of cases in which the condition of a machine as to safety is constantly changing with its use, so as to require from the persons tending it, as a part of the ordinary use of it, reconstruction or readjustment of parts, as they become worn out or displaced, from materials or new parts supplied by the master for that purpose. Such work is a part of the regular business of the servant in using the machine, and not of the master in maintaining it. Negligence in doing it is, as to all other employees, negligence of a fellow servant. So far as the condition of machinery depends upon this kind of attention, the master does his duty if he employs competent and suitable persons, and supplies them with everything needed for their work.

A second class of cases includes those in which repair or reconstruction of a machine is necessary, of such a kind as is commonly done, or may properly be done, under the direction of the master, by servants engaged in the general business. Both parties to the contract must be presumed to have contemplated that such work would be done by fellow servants of the employee, and he must therefore be held to have assumed all risks from their negligence in doing it. But this, it must be remembered, is a part of that work for the results of which, in the completed machine, the master agrees to hold himself responsible, so far as

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good results can be insured by his exercise of proper care. And so he is bound to bring to this department of the business, either in his own person or by an agent, such intelligence, skill, and experience as is reasonably to be required in one to whom in an important particular the safety of others is intrusted, and he is bound also to be reasonably diligent and careful in the use of his faculties. One who represents him in this field is not acting as a fellow servant with his other employees, within the meaning of the rule which we are considering, but is his agent or servant, for whose care and diligence he is accountable.

There may be still a third class of cases, in which a machine is of such a kind, and the nature of the business in which it is used is such, that the parties could never reasonably have contemplated that any servants employed in the business would build or reconstruct it. A proprietor might buy such a machine, or send an agent or servant to buy it. In either case the purchase would be in the line of the master's duty, and he would be liable for the consequences of negligence in making it. He might hire privileges and men in a machine-shop in a distant city, and build it there. His servants in that work would not be fellow servants with an employee engaged in an entirely different business. And under the doctrine of *respondeat superior* he would be held liable for the consequences of their negligence. If he saw fit to construct or reconstruct it, in the same way, in or near the building in which it was to be used, the result would be the same. Upon our hypothesis it would be inconsistent with his implied contract to employ fellow servants of his employee in this work, and he therefore could not relieve himself from his general obligation as to the safety of his machinery by setting up that his servants in the construction or reconstruction were fellow servants with his employees in the business in which it was to be used.

It is believed that the decision in every case in this Commonwealth founded upon alleged negligence of a master in relation to his machinery, tools, or appliances, will be found, upon the view of the facts taken by the court, to be governed by the principles which we have stated. *Elmer* v. *Locke*, 135 Mass. 575. *Johnson* v. *Boston Tow-Boat Co.* 135 Mass. 209. *Rogers* v. *Ludlow Manufacturing Co.* 144 Mass. 198. *Holden* v. *Fitch-*

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burg Railroad, 129 Mass. 268. *Spicer* v. *South Boston Iron Co.* 138 Mass. 426. *McGee* v. *Boston Cordage Co.* 139 Mass. 445. *Arkerson* v. *Dennison*, 117 Mass. 407. *Gilman* v. *Eastern Railroad*, 10 Allen, 233, and 13 Allen, 433. *King* v. *Boston & Worcester Railroad*, 9 Cush. 112; *S. C.* 129 Mass. 277, n. See also *Northern Pacific Railroad* v. *Herbert*, 116 U. S. 642; *Benzing* v. *Steinway*, 101 N. Y. 547.

The facts in this branch of the case at bar are undisputed. The defendant was carrying on the business of manufacturing and finishing straw hats. The plaintiff was injured upon one of several heavy iron machines operated by steam power, manufactured for the defendant in Norwalk, Connecticut. The defendant reconstructed this and three other machines, so as to make them press the brim of hats as well as the crown, they having originally been built to press the crown only. This very materially changed the machine. Mitchell Marcil, who had charge of the work, testified that, after they got the castings and everything ready to put on it, it took him and three other men about four weeks to rebuild it.

None of the officers of the defendant corporation were mechanics, or men having practical knowledge of machinery. They left the reconstruction of the machines entirely to Marcil, to be done upon his own judgment. He also had charge of the machines all the time, and was directed to see what was needed to be done, and to do it. Assuming that this was a machine upon which the defendant might, under its implied contract with the plaintiff, employ his fellow servants in the work of reconstruction, it is evident upon the undisputed testimony that Marcil, while he did some work appropriate for an ordinary servant, was, in relation to the reconstruction and to the charge of this machine, set to do the master's duty. The defendant's officers were personally incompetent to use that skill and judgment in regard to keeping these machines safe which the law required of the defendant, and they left to Marcil the whole business, not only of determining what should be done in reconstructing the machines, and how it should be done, but also of determining what was their condition as to safety when they were finished, and of supervising them in reference to their condition afterward. Taking charge and having supervision of the reconstruction,

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and of the machines afterward, was a part of the master's duty under his implied contract with the plaintiff. Inasmuch as the defendant assumed to do it through Marcil, it is liable for the consequences of his negligence. To hold otherwise would be to permit a master, who is incompetent to perform a duty which the law puts upon him in relation to the condition of his machinery, to relieve himself from all responsibility for the performance of it by employing another to represent him. In the opinion of a majority of the court there was no error in the instructions.

Exceptions overruled.

BENJAMIN B. NEWCOMB *vs.* BOSTON PROTECTIVE DEPARTMENT.

Suffolk. January 25, 1888. — May 4, 1888.

Present: MORTON, C. J., DEVENS, C. ALLEN, HOLMES, & KNOWLTON, JJ.

Personal Injuries — Violation of Ordinance — Contributory Negligence — Evidence.

The fact that a person is injured while violating a city ordinance, through another's negligence, will not defeat his right to recover, unless his unlawful act was a contributing cause of the injury.

Such unlawful act, if it directly contributed to the injury, is a conclusive bar to such recovery, and not merely evidence of contributory negligence.

The St. of 1874, c. 61, § 8, in giving the Boston Protective Department the "right of way while going to a fire," does not relieve it from liability for an injury, caused by its negligence, to a person who is in the exercise of due care, and whose unlawful act does not contribute to the injury.

TORT for personal injuries occasioned to the plaintiff, a cab-driver, by a collision between the cab and a wagon of the defendant.

At the trial in the Superior Court, before *Blodgett*, J., evidence was introduced tending to show that the defendant was incorporated under the St. of 1874, c. 61,* for the protection of life

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* Section 3 of this statute is as follows:

"The officers and men of the Boston Protective Department, with their teams and apparatus, shall have the right of way, while going to a fire, through any street, lane, or alley in the city of Boston, subject to such rules

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and property at fires in the city of Boston, and that the collision occurred while one of its wagons, with its regular complement of men, was responding to a fire alarm; that the wagon was proceeding along Washington Street in a northerly direction; that the cab, upon which the plaintiff was sitting, was one of several cabs standing in a line upon the easterly side of Washington Street between the easterly track of a street railway and the curbstone; that the plaintiff's cab and horse were not drawn up lengthwise of the street and as near as possible to the curbstone, but that the horse was facing the sidewalk at an angle so that the body of the cab projected eighteen or twenty inches into the street beyond the line of the other cabs; and that the wagon of the defendant was driven negligently into the cab, causing the accident.

The defendant asked the judge to instruct the jury as follows:

"1. If the plaintiff, at the time of the accident, was violating the ordinance of the city of Boston, to wit, 'Every owner, driver, or other person having the care and ordering of a vehicle shall, when stopping in a street, place his vehicle and the horse or horses connected therewith lengthwise with the street, as near as possible to the sidewalk,' that was an unlawful act, and he cannot recover in this action. 2. If that unlawful act contributed to cause the alleged injury, the plaintiff was not in the exercise of due care, and therefore he cannot maintain this action. 3. Under section 3, chapter 61, of the Acts of 1874, 'The officers and men of the Boston Protective Department, with their teams and apparatus, shall have the right of way, while going to a fire, through any street, lane, or alley in the city of Boston,' said defendant is not liable for an accident caused by the collision of one of its teams, while going to a fire, with a vehicle standing in the streets, in violation of either of the city ordinances. 4. If the plaintiff, at the time of the action, was violating the ordinance of the city of Boston, to wit, 'Every

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and regulations as the city council and the fire commissioners may prescribe, and subject also to the rights of the Boston Fire Department; and any violation of the street rights of the Boston Protective Department shall be punished in the same manner as is provided for the punishment of violations of the rights of the Boston Fire Department in chapter three hundred and seventy-four of the acts of eighteen hundred and seventy-three."

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driver of a vehicle shall remain near it while it is unemployed or standing in a street, unless he is necessarily absent in the course of his duty and business, and he shall so keep his horse or horses and vehicle as not to obstruct the streets,' that was an unlawful act, and he cannot recover in this action. 5. If that unlawful act contributed to cause the alleged injury, the plaintiff was not in the exercise of due care, and therefore he cannot maintain this action."

The judge refused to give these instructions, but instructed the jury as to the effect of a violation of the ordinance as to the position of a vehicle and horse while standing in a street, stating that the rule was applicable to both ordinances, as follows:

"Bearing in mind the provision of the regulation as to the position of a vehicle when not in motion, I instruct you as to the law, that if, at the time of the injury to the plaintiff, he allowed his carriage to stand in the street in violation of this ordinance, such violation is evidence of negligence on his part; and, if such negligence directly contributed to the injury, the plaintiff cannot maintain the action. It cannot be said, as matter of law, that the fact that the plaintiff was violating a city ordinance necessarily shows negligence that contributed to the injury. Whether the position of the plaintiff's horse and carriage, in violation of an ordinance, did or did not contribute to the injury, is a question of fact for the jury; and in determining this question, the jury will take into consideration all the surrounding facts and circumstances. . . . . The plaintiff must prove that his position was not so carelessly taken as to contribute to the collision; and the fact that his position was in violation of the ordinance is not conclusive proof of negligence which contributed to the injury. Or, stating the general rule in a somewhat different form, the fact that the plaintiff is engaged in violating the law does not prevent him from recovering damages of the defendant for an injury which the defendant could have avoided by the exercise of ordinary care, unless the unlawful act contributed proximately to produce the injury. . . . . If, applying these rules, you are of the opinion that there was no negligence, in other words, no carelessness, on the part of the plaintiff, which directly contributed to the injury, then the plaintiff is entitled to maintain this action, if he proves

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another proposition; and as to that, the burden is upon him. And that proposition is, that the defendant's servants, in the care and management of this wagon, at the time the plaintiff was injured, were negligent."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

R. M. Morse, Jr., for the defendant.

W. Gaston & C. L. B. Whitney, for the plaintiff.

KNOWLTON, J. The plaintiff brought his action to recover for injuries received while sitting upon his cab, from the negligent driving of a wagon against it by a servant of the defendant corporation. There was evidence tending to show that, at the time of the accident, he was violating an ordinance of the city of Boston, by waiting in a street without placing his vehicle and horse lengthwise with the street, as near as possible to the sidewalk, and that this illegal conduct contributed to the injury. There was evidence applicable in like manner to another similar ordinance, which requires every driver of a vehicle standing in a street so to keep his horse or horses and vehicle as not to obstruct the streets.

As to the alleged violation of each of these ordinances, the defendant asked the court to instruct the jury as follows: "If that unlawful act contributed to cause the alleged injury, the plaintiff was not in the exercise of due care, and therefore he cannot maintain this action." The presiding judge declined to give this instruction, and gave none which we deem to be equivalent to it. He instructed the jury in these words: "If, at the time of the injury to the plaintiff, he allowed his carriage to stand in the street in violation of this ordinance, such violation is evidence of negligence on his part; and, if such negligence directly contributed to the injury, the plaintiff cannot maintain the action. It cannot be said, as matter of law, that the fact that the plaintiff was violating a city ordinance necessarily shows negligence that contributed to the injury." In another part of the charge it was indirectly intimated that, if the plaintiff's unlawful act contributed proximately to produce the injury, he could not recover, but it was nowhere expressly stated.

The question before us then is, whether or not the defendant was entitled to this instruction, — in other words, whether, if

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the plaintiff's unlawful act contributed to cause his injury, it was a bar to his recovery, or merely evidence of negligence which might or might not bar him, according to the view which the jury should take of his conduct as a whole, in its relation to the accident.

It has often been held that a violation of law at the time of an accident, by one connected with it, is evidence of his negligence, but not conclusive. *Hanlon* v. *South Boston Horse Railroad*, 129 Mass. 310. *Hall* v. *Ripley*, 119 Mass. 135. *Damon* v. *Scituate*, 119 Mass. 66. In recent times a large number of penal statutes have been enacted, in which the Legislature has seen fit to punish acts which are not *mala in se*, and sometimes when in a given case there is no actual criminal intent. On grounds of public policy, laws have been passed under which a person is bound to know the facts in regard to the subject with which he is dealing, when under possible circumstances ignorance would not be inconsistent with proper care. One who sells milk must know that it is not adulterated. An unlicensed person must know that what he sells is not intoxicating liquor. *Commonwealth* v. *Boynton*, 2 Allen, 160. And if in a possible case he trespasses in innocent ignorance, the law gives him no relief. He can only appeal to the sense of justice and the discretion of the public authorities to save him from the punishment which the law would inflict. It is obvious that in suits for negligence, if the contributing conduct of the plaintiff is to be considered as a whole, it may sometimes be found that he has not been guilty of actual negligence or fault, although he has violated the law. One element of his action may be neglect of a duty prescribed by a statute, when there are other concurring elements which show that his course was entirely justifiable.

As a general rule, in deciding a question in relation to negligence, each element which enters as a factor into one's act to give it character is to be considered in connection with every other, and the result is reached by considering all together. But, for reasons which will presently appear, illegal conduct of a plaintiff directly contributing to the occurrence on which his action is founded, is an exception to this rule. Such illegality may be viewed in either of two aspects: looking at the trans-

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action to which it pertains as a whole, it may be considered as a circumstance bearing upon the question whether there was actual negligence; or looking at it simply in reference to the violated law, the act may be tried solely by the test of that law. In the latter aspect it wears a hostile garb, and an inquiry is at once suggested, whether the plaintiff, as a transgressor of the law, is in a position to obtain relief at the hand of the law. In the first view, the illegal conduct comes within the general rule just stated; in the second, it does not. This distinction has not always been observed. A plaintiff's violation of law has usually been discussed in connection with the subject of due care.

In *Bosworth* v. *Swansey*, 10 Met. 363, Chief Justice Shaw, after referring to the rule that a plaintiff must be free from "imputation of negligence or fault," says, in reference to unlawful travelling on the Lord's day, "This would be a species of fault on his part, which would bring him within the principle of the cases cited."

In *Jones* v. *Andover*, 10 Allen, 18, Chief Justice Bigelow says, "The term 'due care,' as usually understood in cases where the gist of the action is the negligence of the defendant, implies not only that a party has not been negligent or careless, but that he has been guilty of no violation of law in relation to the subject matter or transaction which constitutes the cause of action."

In *Steele* v. *Burkhardt*, 104 Mass. 59, an action for negligence in driving against the plaintiffs' horse, which was left standing in a street in violation of an ordinance, Chief Justice Chapman considers the general subject of the plaintiffs' due care, and then treats particularly the contention of the defendant that the plaintiffs were compelled to prove their violation of law in order to establish their case.

McGrath v. *Merwin*, 112 Mass. 467, was an action founded on the defendant's alleged negligence in starting the machinery of a mill, while the plaintiff was at work in the wheel-pit making repairs on the Lord's day, and Mr. Justice Morton, in delivering the opinion, deals with the case solely upon the principle that courts will not aid a plaintiff whose action is founded upon his own illegal act, and says, "The decisions in this Commonwealth are numerous and uniform to the effect that the plaintiff, being engaged in a violation of law, cannot recover, if his own

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illegal act was an essential element of his case as disclosed upon all the evidence." He further states the rule in such cases to be, that, "if the illegal act of the plaintiff contributed to his injury, he cannot recover; but though the plaintiff at the time of the injury was acting in violation of law, if his illegal act did not contribute to the injury, but was independent of it, he is not precluded thereby from recovering."

In *Davis* v. *Guarnieri*, 45 Ohio St. 470, Owen, C. J. states, as the second of three considerations upon which the doctrine of contributory negligence is founded, "the principle which requires every suitor who seeks to enforce his rights or redress his wrongs to go into court with clean hands, and which will not permit him to recover for his own wrong."

No case has been brought to our attention, and upon careful investigation we have found none, in which a plaintiff whose violation of law contributed directly and proximately to cause him an injury has been permitted to recover for it; and the decisions are numerous to the contrary. *Hall* v. *Ripley*, 119 Mass. 135. *Banks* v. *Highland Street Railway*, 136 Mass. 485. *Tuttle* v. *Lawrence*, 119 Mass. 276, 278. *Lyons* v. *Desotelle*, 124 Mass. 387. *Heland* v. *Lowell*, 3 Allen, 407. *Steele* v. *Burkhardt*, 104 Mass. 59. *Damon* v. *Scituate*, 119 Mass. 66. *Marble* v. *Ross*, 124 Mass. 44. *Smith* v. *Boston & Maine Railroad*, 120 Mass. 490. And it is quite immaterial whether or not a plaintiff's unlawful act contributing to his injury is negligent or wrong when considered in all its relations. He is precluded from recovering, on the ground that the court will not lend its aid to one whose violation of law is the foundation of his claim. *Hall* v. *Corcoran*, 107 Mass. 251.

While this principle is universally recognized, there is great practical difficulty in applying it. The best minds often differ upon the question whether, in a given case, illegal conduct of a plaintiff was a direct and proximate cause contributing with others to his injury, or was a mere condition of it; or, to state the question in another way, appropriate to the reason of the rule, whether or not his own illegal act is an essential element of his case as disclosed upon all the evidence. Upon this point it is not easy to reconcile the cases. It has been unanimously decided that in *Gregg* v. *Wyman*, 4 Cush. 322, there was error

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in holding a plaintiff's illegal conduct to be an essential element of his case, when in fact it was merely incidental to it. *Hall* v. *Corcoran*, *ubi supra*. But whatever criticisms may have been made upon the decisions or the assumptions in certain cases, that illegal action of a plaintiff contributed to the result, or was to be treated as a concurring cause, or upon language in disregard of the distinction between a cause and a condition, there has been none upon the doctrine that, when a plaintiff's illegal conduct does directly contribute to his injury, it is fatal to his recovery of damages. *Baker* v. *Portland*, 58 Maine, 199. *Norris* v. *Litchfield*, 35 N. H. 271. *Sutton* v. *Wauwatosa*, 29 Wis. 21.

The plaintiff relies with great confidence upon the case of *Hanlon* v. *South Boston Horse Railroad*, 129 Mass. 310, in which the presiding judge at the trial refused to rule, that, "if the defendant was driving at a rate of speed prohibited by the ordinance of the city of Boston, and this speed contributed to the injury, this fact would itself constitute negligence on the part of the defendant, and would entitle the plaintiff to recover if he was in the exercise of due care," and his refusal was held right by this court. In giving the opinion, after pointing out that driving at a rate of speed forbidden by the ordinance might have occurred without fault of the driver, and might have been justified by circumstances authorizing the jury to find that there was no negligence, Mr. Justice Colt said, "It is not true that, if an unlawful rate of speed contributed to the injury, that alone would give the plaintiff a right to recover, if he was without fault." There are intimations, without adjudication, to the same effect, in *Wright* v. *Malden & Melrose Railroad*, 4 Allen, 283, and in *Lane* v. *Atlantic Works*, 111 Mass. 136. See also *Kirby* v. *Boylston Market Association*, 14 Gray, 249; *Heeney* v. *Sprague*, 11 R. I. 456; *Brown* v. *Buffalo & State Line Railroad*, 22 N. Y. 191; *Flynn* v. *Canton Co.* 40 Md. 312.

But there is nothing in the language used in *Hanlon* v. *South Boston Horse Railroad* inconsistent with the principle which we have already stated. That decision related to the liability of a defendant. It may be, where a penal statute does not purport to create a civil liability, or to protect the rights of particular persons, that a violation of it will not subject the violator to an action for damages, unless his act, when viewed in connection

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with all the attendant circumstances, appears to be negligent or wrongful. And at the same time courts may well hold that, in the sanctuary of the law, a violator of law imploring relief from the consequences of his own transgression will receive no favor.

The instruction requested in the case at bar would have become applicable only upon a finding by the jury that the plaintiff's unlawful act contributed to cause the injury. The jury may have so found; and we are of opinion that upon such a finding, irrespective of the question whether viewed in all its aspects his act was negligent or not, the court could not properly permit him to recover. The instruction, therefore, should have been given.

The court rightly refused the instruction requested, that the plaintiff could not recover if at the time of the accident he was violating the ordinance, and so doing an unlawful act. This request ignored the distinction between illegality which is a cause, and illegality which is a condition of a transaction relied on by a plaintiff, or between that which is an essential element of his case when all the facts appear, and that which is no part of it, but only an attendant circumstance. The position of a vehicle, which has been struck by another, may or may not have been one of the causes of the striking. Of course it could not have been struck if it had not been in the place where the blow came. But this is a statement of an essential condition, and not of a cause of the impact. The distinction is between that which directly and proximately produces, or helps to produce, a result as an efficient cause, and that which is a necessary condition or attendant circumstance of it. If the position of the plaintiff's vehicle was such as, in connection with ordinary and usual concurring causes, would naturally produce such an accident, that indicates that it contributed to it. But, even in that case, external causes may have been so exclusive in their operation, and so free from any relation to the position of the vehicle, as to have left that a mere condition, without agency in producing the result. What is a contributing cause of an accident is usually a question for a jury, to be determined by the facts of the particular case; and such it has been held to be in many cases like the one before us. *Damon* v. *Scituate*, 119 Mass. 66. *Hall* v. *Ripley*, 119 Mass. 135. *Welch* v. *Wesson*, 6 Gray, 505.

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Spofford v. *Harlow*, 3 Allen, 176. *White* v. *Lang*, 128 Mass. 598. *Baker* v. *Portland*, 58 Maine, 199. *Norris* v. *Litchfield*, 35 N. H. 271. *Sutton* v. *Wauwatosa*, 29 Wis. 21.

The defendant's third request for an instruction was rightly refused, for reasons which have already been stated. The statute referred to does not relieve the defendant from liability for negligence to a plaintiff whose unlawful act or want of due care does not contribute to his injury. In the opinion of a majority of the court the entry must be *Exceptions sustained.*

WILLIAM B. STEWART *vs.* BOSTON AND PROVIDENCE RAILROAD COMPANY.

Suffolk. March 6, 1888. — May 4, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Railroad — Personal Injuries — Passenger — Negligence.

A passenger, through his own fault, took an express train instead of a local train as he intended, and, after the train started, was told by the conductor, "You will have to ride as far as C. Junction, take the two rear cars, and come back," at a later hour. He immediately started for those cars, and in going from one car to another was thrown from the platform by a lurch of the train and a collision with another passenger, and was injured. *Held*, that the facts did not show negligence of the railroad company causing the injury.

TORT for personal injuries sustained by the plaintiff by being thrown from a car of the defendant. Trial in the Superior Court, before *Pitman*, J., who ordered a verdict for the defendant, and reported the case for the determination of this court, in substance as follows.

The plaintiff testified that he lived on the line of the defendant's railroad, and that on the afternoon of December 15, 1885, instead of taking a train that stopped at his station, as he intended, he entered another train by mistake; that after the train had started, the conductor, on looking at his ticket, told him that the train was an express train that did not stop at his station; that the conductor then said to him, "You will have to ride as

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far as Canton Junction, take the two rear cars, and come back at half-past eight"; that he "immediately got up to take the two rear cars"; that while on his way, as he was passing from one car to another, he met a woman coming towards him; that he had just time to turn on his heel to let her pass, "when the train gave a lurch to the left, threw me off my balance, and I instinctively threw out my left hand to grasp the railing between the two cars, and this lady was thrown against me, and the next thing I knew I found myself lying on the track and that I had been hurt"; and that there was no gate on the platform of the car.

If the plaintiff was entitled to go to the jury on the above facts, then the verdict was to be set aside, and a new trial granted; otherwise, judgment was to be entered on the verdict.

G. A. Perkins, for the plaintiff.

G. Putnam & T. Russell, for the defendant.

MORTON, C. J. The plaintiff took the wrong train through his own fault. After the train had started, the conductor discovered this, and informed the plaintiff that he could not stop at the point to which he wished to go, but that, by taking one of the two rear cars, he could get off at a station beyond, and return to his destination at a later hour. This was not a command or direction by the conductor that the plaintiff should go from the car he was in to the rear car, which justified him in doing so at the risk of the defendant. In going from one car to another of a rapidly moving train, merely for his own convenience, the plaintiff took upon himself the risk of all accidents not arising from any negligence of the defendant. While crossing over one of the platforms between the cars, the plaintiff came in collision with another passenger crossing the platform in an opposite direction, "the train gave a lurch to the left," and he was thrown from the platform. There is nothing to show that the lurch was extraordinary, or anything more than a usual and inevitable incident of a swiftly moving train. The evidence fails to show any negligence of the defendant which caused the accident, and the Superior Court therefore rightly directed a verdict for the defendant. *Judgment on the verdict.*

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ASA B. FOSTER *vs.* RANFORD WORTHING.

Suffolk. March 6, 1888. — May 4, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Promissory Note — Payment — Evidence — Witness — Contradiction.

On the issue whether a note made by a mining company and indorsed by its directors was to be paid by them or by the plaintiff as an accommodation indorsee, a witness, who was a director, testified that the note was to be paid by the plaintiff, and, to contradict him, a letter of his to the plaintiff was introduced in evidence, requesting him to procure a renewal of the note by a note of the company with the old note, duly protested, attached. *Held*, that the letter was rightly admitted.

CONTRACT, against Ranford Worthing and Henry E. Irvine, upon two promissory notes, dated November 14, 1881, and payable in two months, made by the El Gachi Mining Company, and indorsed by them and other directors of the company. The plaintiff discontinued as to Irvine.

Trial in the Superior Court, without a jury, before *Mason*, J., who allowed a bill of exceptions, in substance as follows.

The defendant contended, and introduced in evidence the deposition of Irvine as tending to show, that as between the plaintiff and the defendant the notes, which had been indorsed by the plaintiff to a bank for discount, were without consideration; that they were indorsed by the defendant and the other directors for the accommodation of the plaintiff, in order to enable him to raise money and carry out a contract between the plaintiff, who was also a director, and the other directors, binding him to furnish the necessary funds to carry on the company's mine for six months from October 26, 1881; and that when the notes became due, the plaintiff, as between himself and the directors, was to take care of the notes and pay them. The plaintiff was permitted to introduce in evidence, as tending to contradict Irvine's testimony in his deposition, a portion of a letter, dated December 22, 1881, and written by him to the plaintiff, as follows: "Should we not be able to make any payment on the first note of $5,000, due the Eastern Township Bank on the 17th of January next, please instruct them to renew the same on the issue of the note of the

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company, with old note (duly protested) attached. This will do away with the necessity of our sending a renewal to each of the indorsers for their indorsement."

The judge found for the plaintiff; and the defendant alleged exceptions.

G. D. Ayers & G. C. Hodges, for the defendant.

C. L. B. Whitney & F. C. Manchester, for the plaintiff.

C. ALLEN, J. The principal question was, whether, as between the plaintiff and the defendant, it was the plaintiff's duty to provide for the payment of the notes in suit. The defendant contended that it was, and introduced in evidence the deposition of Irvine, tending to prove that it was so understood at the time the notes were made. As tending to contradict Irvine, the plaintiff was then allowed to introduce a letter written by Irvine to the plaintiff, shortly before the notes became due. The defendant now contends that this letter did not contradict Irvine, but was consistent with his testimony. It is not necessary, in order to make the letter competent, that there should be a contradiction in plain terms. It is enough if the letter, taken as a whole, either by what it says or by what it omits to say, affords some presumption that the fact was different from his testimony. And in determining this question, much must be left to the discretion of the presiding judge. Declarations or acts, or omissions to speak or to act when it would have been natural to do so if the fact were as testified to, may be shown by way of contradiction or impeachment of the testimony of a witness, when they fairly tend to control or qualify his testimony. *Clement* v. *Kimball*, 98 Mass. 535. *Brigham* v. *Clark*, 100 Mass. 430. *Snow* v. *Moore*, 107 Mass. 512. *Hook* v. *George*, 108 Mass. 324. *Hayden* v. *Stone*, 112 Mass. 346. *Perry* v. *Breed*, 117 Mass. 155, 165. *Brigham* v. *Fayerweather*, 140 Mass. 411, 416. The letter of Irvine in the present case falls within this rule. It related directly to the subject of making payment of the first note, and it bore upon the probability of Irvine's testimony. It was, of course, open to explanation, and its weight is not for us to consider; but it was competent. *Exceptions overruled.*

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CHARLOTTE V. NICKERSON *vs.* HENRY C. THACHER.

Barnstable. March 8, 1888. — May 4, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Trespass — Title — Dower — Evidence — Probate Court.

A person in actual occupation of land may maintain trespass against any one except the real owner, or one having the right of possession.

A dowress in occupation of land may, in an action of trespass against a stranger, put in evidence, on the question of her possession, probate proceedings setting off the land to her, which, whether valid or invalid, have never been doubted.

TORT for breaking and entering the plaintiff's close, and taking away sand, wood, trees, and cranberries.

At the trial in the Superior Court, before *Staples*, J., it appeared that the plaintiff occupied the locus as a part of land set off to her as dower. The plaintiff was permitted to introduce, as evidence of her title and possession, proceedings in the Probate Court by which it appeared that commissioners duly appointed to set off dower made a report reciting that the dower as set off was equal to one half of the estate of her deceased husband; that Josiah Taylor and Sophia Taylor, being the only heirs of her husband, assented in writing to the report; and that on April 16, 1878, the Probate Court made a decree accepting the report, "all parties interested .... having assented thereto in writing," and assigning the land so set off to the plaintiff as tenant in dower. The only objection by the defendant to the plaintiff's recovery was to the admission of such report and decree, on the ground that the commissioners had no power to set off one half of the estate as dower, and that the decree was void. The jury found for the plaintiff; and the defendant alleged exceptions.

T. C. Day, for the defendant.

H. P. Harriman, for the plaintiff.

C. ALLEN, J. One who is in the actual occupation of land may maintain trespass against any person except the real owner, or the person having a right of possession. *Barnstable* v. *Thacher*, 3 Met. 239. *Sweetland* v. *Stetson*, 115 Mass. 49. There was nothing to show that the defendant had any right whatever to

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go upon the land; but the stress of his argument is, that the plaintiff's title was not good. We need not enter upon that question; although we may remark that those in whom the title stood, if not in her, not only have never questioned, but expressly affirmed her title. The utmost that we have to decide is, that the proceedings setting off the land to her, whether valid or invalid, never having been doubted, might be put in evidence upon the question of her possession of the land. And of this we have no doubt. *Allen* v. *Taft*, 6 Gray, 552, 554. *Motte* v. *Alger*, 15 Gray, 322. *Exceptions overruled.*

LUCY K. GILLESPIE & others *vs.* JOSIAH W. ROGERS.

Barnstable. March 9, 1888. — May 4, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Deed — Name — Registration — Constructive Notice.

The registry of a deed executed by J. N. H, in which he calls himself J. H., by which latter name he is equally well known in the town where he lives, is constructive notice to all persons of the transfer of the title.

WRIT OF ENTRY to recover a parcel of land in Chatham. At the trial in the Superior Court, before *Mason*, J., without a jury, evidence was introduced tending to show the following facts.

On February 27, 1851, James N. Howes, who was then the owner of the demanded premises, conveyed them to his brother, Henry N. Howes, by a deed, duly recorded on July 26, 1851, in which he called himself James Howes, and which he so signed. On March 21, 1870, Henry N. Howes conveyed the premises to the demandants, who were the daughters of James N. Howes, and who thereupon took possession of the same. James N. Howes on September 13, 1886, then holding under the demandants, conveyed the demanded premises to the tenant, who was his stepson, by a deed which recited his full name, and was signed James N. Howes. This deed was duly recorded on September 15, 1886, and the tenant entered into possession. The tenant at the time he took his deed had no actual notice of the deeds to

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and from Henry N. Howes. James N. Howes was as well known in Chatham by the name of James Howes as by that of James N. Howes, both at the date of the deed to Henry N. Howes and at the date of that to the tenant.

The judge found for the demandants, and reported the case for the determination of this court. If the evidence was sufficient to sustain the finding, and was properly admitted, judgment was to be entered for the demandants; otherwise, a new trial was to be granted.

H. P. Harriman, for the tenant.

J. M. Day & T. C. Day, for the demandants.

C. ALLEN, J. There can be no doubt that the deed which was executed by James N. Howes, in which he called himself James Howes, was good as against him and his heirs and devisees. The omission of the initial letter of his middle name did not vitiate the grant. And it was competent to show that he was as well known without a middle name as with one. Shep. Touch. 232, 233. 3 Washb. Real Prop. (5th ed.) 278, 281. *Games* v. *Stiles*, 14 Pet. 322, 327. The same rule exists in case of a mistake in the name of the grantee. *Hall* v. *Leonard*, 1 Pick. 27, 30. *Thomas* v. *Marshfield*, 10 Pick. 364, 367. *Scanlan* v. *Wright*, 13 Pick. 523. *Peabody* v. *Brown*, 10 Gray, 45. And it is not absolutely necessary that either grantor or grantee be named at all, if so described that he can be clearly ascertained. *Shaw* v. *Loud*, 12 Mass. 447. Shep. Touch., and Washb. Real Prop., *ubi supra*. *Reeves* v. *Watts*, 7 B. & S. 523. *Maugham* v. *Sharpe*, 17 C. B. (N. S.) 443.

It is contended, however, that the record of the deed signed James Howes did not give a good constructive notice of a conveyance of the title of James N. Howes. But since the deed was valid as against the grantor and his heirs and devisees without registration, it would seem that the registration would make it valid as against all persons. Such seems to be the effect of the statute. Rev. Sts. c. 59, §§ 1, 28. The title passed by the deed, not by the registration. But to give this title full effect, and prevent its being questioned by purchasers and creditors of the grantor, there must be actual notice of the deed, or registration, which is constructive notice. *Dole* v. *Thurlow*, 12 Met. 157, 162. *Earle* v. *Fiske*, 103 Mass. 491. And such actual or constructive

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notice has the effect to bind others, in like manner as the grantor and his heirs and devisees are bound by the mere execution and delivery of the deed. It makes no difference if the constructive notice provided for by law proves insufficient. A deed is considered to be recorded when it is noted by the recording officer as having been received for record in the book kept for that purpose. Rev. Sts. c. 59, § 24; Gen. Sts. c. 17, § 93; Pub. Sts. c. 24, § 15. And if the recording officer places upon it his certificate that it has been so received, even though he afterwards fails in his duty by recording it inaccurately, by omitting material portions of it, or even by altogether suppressing it from the records, yet in contemplation of law the whole world has constructive notice of it, just the same as if it had been accurately copied in full upon the records. *Tracy* v. *Jenks*, 15 Pick. 465. *Ames* v. *Phelps*, 18 Pick. 314. *Jordan* v. *Farnsworth*, 15 Gray, 517. *Fuller* v. *Cunningham*, 105 Mass. 442. *Adams* v. *Pratt*, 109 Mass. 59. *Wood* v. *Simons*, 110 Mass. 116. *Sykes* v. *Keating*, 118 Mass. 517, 519. *Getchell* v. *Moran*, 124 Mass. 404. It is obvious that, under this rule, one searching the records may fail to find all that is necessary for his protection; but nevertheless he will be bound. In other respects, also, the records of deeds may fail to give full information as to the title. For example, an apparently perfect record title may be bad, because the grantor in a deed may have been disseised or insane, or because the title has been defeated by an adverse possession. In either of these cases, resort must be had to extrinsic evidence to determine where the title is, and whoever searches the title upon the records, if he would be absolutely safe, must do so with a knowledge of facts not disclosed by the records themselves.

In like manner, where deeds or other instruments requiring to be recorded are given or received by persons or corporations known by different names, the records may fail to furnish exact and literal information; and yet, where the instrument itself is a genuine one, and has been executed in good faith, the record has been held sufficient to furnish constructive notice of the real transaction. A striking illustration of this is found in a former decision of this court. The St. of 1865, c. 43, § 2, provided that no assignment of future earnings should be valid against a trustee process, unless recorded in the town or city clerk's office

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before the service of process. A man by the name of Germain Sirois, who was also sometimes called John Keever, made an assignment of his future earnings under the name of Joseph Cyr, which name he signed by his mark, being unable to read or write. This was duly recorded. There was no intention of misleading anybody by the wrong name affixed to the assignment; it was a mistake, the man being an ignorant foreigner, who could not speak English. Afterwards a creditor brought a trustee process. It was held that the assignment was good as between the original parties to it, and being recorded was good as against attaching creditors. *Ouimet* v. *Sirois*, 124 Mass. 162. See also *Gifford* v. *Rockett*, 121 Mass. 431; *O'Connor* v. *Cavan*, 126 Mass. 117.

So in the present case, it being found as a fact that the grantor was as well known in the town where he lived by the name of James Howes as by his true name of James N. Howes, the record of his deed under the name of James Howes to Henry N. Howes was constructive notice of the real transaction between those parties. Nor can it be doubted that it would have proved sufficient for the protection of the tenant, if he had taken pains to examine the records. *Judgment for the demandants.*

HORACE B. TAYLOR *vs.* DEXTER ENGINE COMPANY.

Suffolk. March 8, 1888. — May 4, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Pleading — Declaration — Bill of Particulars — Implied Promise — Storage.

A declaration for use and occupation, according to a bill of particulars for the "use of store basement" between certain dates, was amended so as to read "for warehouse room furnished by the plaintiff for the storage of an engine, the property of the defendant," according to the same bill. *Held*, that the amended declaration and the bill of particulars were sufficient.

If a lessor, who takes possession of the leased premises upon the tenant's failure to pay rent, notifies the owner of an engine put in for the tenant's use, that, if he does not remove it, he will charge him for each day it continues to remain there, a promise on such owner's part to pay storage for the time thereafter elapsing may be implied.

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CONTRACT. The original declaration was for use and occupation of certain premises, according to an account annexed, the several items of which were for the "use of store basement, corner of Hartford and Wendell Streets," in Boston, between dates specified. The plaintiff filed an amended declaration "for warehouse room furnished by the plaintiff for the storage of an engine, the property of the defendant," according to the same account annexed. Trial in the Superior Court, without a jury, before *Thompson*, J., who found for the plaintiff, and made a report of the case, of which the pleadings were a part, for the determination of this court. The facts appear in the opinion.

C. W. Bartlett, for the defendant.

Sherman Hoar & S. D. Charles, for the plaintiff, were not called upon.

C. ALLEN, J. By the amended declaration, the plaintiff sought to recover "for warehouse room furnished by the plaintiff for the storage of an engine, the property of the defendant." This is according to the form contained in the schedule of forms appended to § 94 of the Pub. Sts. c. 167. At the outset, the engine had been lawfully put into the basement of the plaintiff's building, but, upon a failure of the tenant of the premises to pay rent, the plaintiff took possession, and notified the defendant corporation that, if it did not remove the engine, he should make a certain charge to the defendant for every day it remained there. The engine was left there awhile longer. At the trial, which was without a jury, and which resulted in a finding for the plaintiff, the defendant contended that the plaintiff was not entitled to recover, under the pleadings; and at the argument in this court the defendant supports this contention, on the ground that the bill of particulars, which is for the "use of store basement," is descriptive of a claim for use and occupation. It is true that the bill of particulars would be good under the original count for use and occupation; but it is equally good under the amended count. The defendant now further contends that the facts stated in the judge's report of the case were insufficient to support this count. But no such question appears to have been taken at the trial, and the report is not made with reference to any such question. Besides, we think the facts are sufficient, even as stated, and a promise to pay for storage might

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fairly be implied from them. 2 Greenl. Ev. § 108. *Horton* v. *Cooley*, 135 Mass. 589. It is suggested that the defendant might have intended to abandon the engine to the plaintiff, instead of paying for the storage. But the judge might properly find the contrary. It is to be inferred that the defendant finally removed it. No error appears in the finding for the plaintiff.

Judgment on the finding.

BENJAMIN LANCY *vs.* JOHN C. P. HAVENDER.

Suffolk. March 8, 1888. — May 4, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Illegal Contract — Champerty — Insolvency Court.

An agreement by creditors, signed by them, to pay a person employed "to collect or aid us in collecting our several claims" one half of the amount collected, whether the debtor "shall settle with or without going into insolvency, — the undersigned to pay no expenses not even from their one half of whatever may be received," — is unlawful and void for champerty.

CONTRACT to recover $819.56, for breach of the following agreement, signed by the defendant and others: "Provincetown, January 17, 1879. Having employed Benjamin Lancy, of Provincetown, to collect, or aid us in collecting, our several claims against the Union Wharf Company, of said Provincetown, we hereby agree to pay him fifty per cent of any amount received on our several claims, whether said company shall settle with or without going into insolvency, — the undersigned to pay no expense, not even from their one half of whatever may be received."

At the trial in the Superior Court, before *Hammond*, J., there was evidence that the plaintiff by his efforts, and through proceedings in the Court of Insolvency instituted by him, and at his own cost and expense, collected for, or caused to be paid to, the defendant, the sum of $1,639.13 of the latter's claim against the wharf company.

The judge ruled that the agreement was champertous, ordered a verdict for the defendant, and reported the case for the deter-

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mination of this court. If the ruling was correct, judgment was to be entered for the defendant; otherwise, for the plaintiff.

J. M. Day & T. C. Day, for the plaintiff.

G. Z. Adams & G. R. Blinn, for the defendant.

W. ALLEN, J. By the agreement, the plaintiff was to have one half of the amount recovered, and was to make no charge for his services and expenses; and the action is not to recover for services rendered and money paid, but for breach of the agreement. The agreement was clearly champertous under the decisions of this court. *Thurston* v. *Percival*, 1 Pick. 415. *Ackert* v. *Barker*, 131 Mass. 436. *Belding* v. *Smythe*, 138 Mass. 530. In *Blaisdell* v. *Ahern*, 144 Mass. 393, the plaintiff's compensation was to be paid by the defendant, and the amount which might be recovered was referred to only to limit the amount with which the plaintiff might charge the defendant; in the case at bar the plaintiff undertook the collection of the debt for one half of the avails, and his only claim against the defendant is for withholding the plaintiff's share of the amount recovered.

It is argued that the agreement does not mention a suit, and that the debt might have been collected without one. But the agreement clearly contemplated legal proceedings, and the proceedings in the Insolvency Court constituted a suit.

Judgment for the defendant.

PHILIPPE DE SÉNANCOUR *vs.* SOCIÉTÉ LA PRÉVOYANCE.

Suffolk. March 13, 1888. — May 4, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Libel — Publication.

A beneficiary association appointed a committee to investigate a bill presented by a member, and the committee made without authority a libellous report in print at a regular meeting, by placing on the secretary's desk copies thereof, which were then freely taken from the desk by the members present. The association then voted to hold a special meeting for action on the report, at which meeting a vote was passed to adopt it. *Held*, that there was no publication of the libel by the association.

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TORT for libel. The declaration also contained counts for damages for the expulsion of the plaintiff from membership in the defendant society, and for the lapse of his certificate of insurance.

Trial in the Superior Court, without a jury, before *Barker*, J., who found for the defendant, and reported the case for the determination of this court, in substance as follows.

The defendant was a beneficiary association for persons speaking the French language, which, in addition to insuring the lives of members, made them a certain allowance a week when they were ill, and paid for those things which the attending physician might prescribe. The plaintiff had suffered from a long illness during the summer of 1885, and at the regular society meeting in October presented a bill for his weekly allowance. At that meeting the society voted to appoint a committee to investigate this bill among others, and a committee of three were appointed for that purpose. At the next regular meeting the committee made a report in print, by placing on the secretary's desk copies of this report, which were then freely taken from the desk by members present, and then passed about in the meeting. This report contained libellous and defamatory references to the plaintiff's character, and recommended that he be expelled from the society. Some of these copies afterwards came into the hands of persons not members, but there was no publication of them by the society other than the distribution of them at the meeting, as above stated. It was voted to hold a special meeting to act upon the report, at which the report was adopted by an almost unanimous vote. The plaintiff was notified subsequently that he had been expelled from further membership in the defendant society, and was threatened with bodily harm if he again appeared at its meetings.

The judge found that the committee of investigation were not specially directed or authorized by any vote or regulation of the society to make their report in print, and ruled that, upon the facts, the defendant could not be held responsible for any publication of the libel, that the plaintiff remained a member of the society, notwithstanding the vote of expulsion, and that the certificate of insurance was not annulled. If the rulings were correct, judgment was to be entered on the finding for the defendant; otherwise, such disposition of the cause was to be made as law and justice might require.

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E. B. Goodsell, for the plaintiff.

C. J. Noyes & E. B. Callender, (*L. Girardin* with them,) for the defendant.

C. ALLEN, J. The defendant corporation appointed a committee to investigate certain bills presented by the plaintiff, without specially directing or authorizing them, by any vote or regulation of the corporation, to make their report in print; and, in the absence of any usage to that effect, there was no express or implied authority to the committee to make or circulate a report on a subject of this nature in print. Such an act cannot be said to have been done in the due course of their employment, there being nothing to show, or to raise any inference, that the corporation had any reason to expect or understand that it would be so done. The committee, however, made a report in print at a regular meeting, by placing on the secretary's desk printed documents or reports, which were then freely taken from the desk by members present in the meeting, and which were libellous. In all this, there was nothing for which the corporation was responsible. It was only the individual acts of the committee, and of certain members. The omission of the secretary to prevent members from taking the reports from his desk was not sufficient, as matter of law, to put upon the corporation the responsibility for their circulation. All that the corporation did at that meeting in respect to the report was to vote to hold a special meeting to pass upon its adoption. At the next meeting, the corporation voted to adopt the report; but this was not a publication of it, and no fact is stated which shows that the corporation gave to the report any currency or circulation, or any sanction to its previous circulation. It is not as if the corporation, after adopting the report, had circulated it. *Philadelphia, Wilmington, & Baltimore Railroad* v. *Quigley*, 21 How. 202. *New Brunswick & Canada Railway* v. *Conybeare*, 9 H. L. Cas. 711, 725. Under these circumstances, there was no evidence of any publication of the libel by the defendant.

The court did not reach the question of privilege, having disposed of the case on the ground that there was no publication, and that question, therefore, is not to be considered here.

The plaintiff at the argument did not insist on his claim for damages for the vote by which the defendant assumed to expel him from membership. *Judgment for the defendant.*

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GEORGE L. THORNDIKE, administrator, *vs.* WELLS MEMORIAL ASSOCIATION.

Suffolk. March 14, 1888. — May 4, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Action — Party Wall — Demand — Interest.

If the adjoining owners of city lots in an agreement for a party wall to be built by one of them provide that the other, upon using it, shall pay the one building it for the portion used, the value to be fixed by an appraisal by third persons, a demand for payment, and an action to recover therefor, before such an appraisal is made, or something done to prevent or avoid it, are premature.

Interest is not recoverable on the sum due, either from the date when the use began, or from that of the demand.

CONTRACT to recover one half the cost of a party wall. Writ dated November 23, 1886. At the trial, without a jury, in the Superior Court, before *Mason*, J., the following facts were agreed.

On June 19, 1880, William H. Thorndike, the plaintiff's intestate, and Caroline A. Brewer, trustee, being the owners of adjoining lots of land in Boston, entered into an agreement in writing, which provided that Thorndike should build the wall for the benefit of both lots; that for that purpose he might enter upon and use so much of Brewer's lot as might be requisite, provided the wall should be begun and finished within a year from the date of the agreement; that Brewer should have the right to elect to build the wall in like manner, if Thorndike failed so to do; and that "whichever of said owners shall build such wall, the owner of the adjoining parcel, when using the same, shall pay the then market value of so much of said wall as he, she, or they shall use, such market value at the time of such use to be ascertained by the appraisal of two or more competent builders."

Thorndike built the wall in 1880, and the defendant, who claimed title under Brewer, began to use it on August 1, 1882, such use being notorious and known to Thorndike. Thorndike died on December 26, 1884, and the plaintiff, having been duly appointed administrator of his estate, on or about December 10,

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1885, made a demand on the defendant for payment of the sum due under the agreement. No attempt had been made by the parties to ascertain by appraisement the value of the portion used; but it was agreed that the market value of one half of so much of the wall as the defendant used was $1,566.40, on August 1, 1882, and that it had not varied from that amount. The defendant tendered to the plaintiff the sum of $1,600, and subsequently paid it into court.

The plaintiff asked the judge to rule, that he was entitled to interest either from August 1, 1882, or from the date of his demand upon the defendant for payment, but the judge refused so to rule, and found for the defendant. The plaintiff alleged exceptions.

A. D. Bosson, for the plaintiff.

F. V. Balch & F. Rackemann, for the defendant.

C. ALLEN, J. The sum which the defendant was bound to pay, upon using the wall, was "the then market value of so much of said wall as he, she, or they shall use, such market value at the time of such use to be ascertained by the appraisal of two or more competent builders." Until an appraisement by builders, or until something done by the defendant to prevent or avoid it, the defendant was in no such default as to entitle the plaintiff to maintain an action upon the agreement. The contract did not make it the duty of the defendant to go forward and appoint appraisers, of its own motion, independently of the plaintiff's concurrence, and without any request to that effect from the plaintiff. The plaintiff's demand of payment was therefore premature, because the sum to be paid was not ascertained. *Haley* v. *Bellamy*, 137 Mass. 357. *Hood* v. *Hartshorn*, 100 Mass. 117. *Humaston* v. *Telegraph Co.* 20 Wall. 20, 28. *Thurnell* v. *Balbirnie*, 2 M. & W. 786. *Clarke* v. *Westrope*, 18 C. B. 765, 785. The plaintiff's demand did not entitle him to interest, the sum due to him being unliquidated. *Palmer* v. *Stockwell*, 9 Gray, 237.

Exceptions overruled.

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CHARLES JENNINGS & others *vs.* FITCHBURG RAILROAD COMPANY.

Suffolk. March 15, 1888. — May 4, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, & HOLMES, JJ.

Action — Negligence — Railroad — Drawbridge.

A superintendent of a railroad drawbridge has no right to open it within the fifteen minutes allowed to a train, by the Pub. Sts. c. 112, § 150, to cross the draw before and after it is due by its schedule time.

A declaration in an action against a railroad corporation, alleged that the plaintiff's schooner, while waiting to pass its drawbridge, got her stern caught under the draw, which was closed; that the master requested the superintendent to open the draw, and he wilfully and negligently refused; and that, as the tide was rising, she was thereby sunk and lost; but did not aver that the request was made at a time when the plaintiff or the master had a right to have the draw open. *Held*, that no cause of action was shown.

TORT. The declaration, as amended, alleged that the plaintiffs were the owners of a schooner, which was proceeding up the Charles River with a cargo of sand; that the defendant, as authorized by statute, owned and maintained a drawbridge for the passage of trains across that river; that the defendant was required by law to open the drawbridge and afford all proper accommodation to vessels having occasion to pass the same; that the schooner, having occasion to pass the drawbridge, and while waiting to pass it, caught her stern under the draw, which was closed, in such a manner that she could not be released except by opening or partially opening the draw; that the draw might easily and quickly, and without damage, injury, or delay to the defendant, its trains or passengers, have been opened slightly, and the schooner released; that the master and crew of the schooner requested the defendant or its agents in charge of the draw so to open it, but they wilfully and negligently refused to do so, or to allow the draw to be opened, whereby the schooner was pressed entirely under water as the tide rose, and with her cargo and appurtenances was sunk and totally lost. The defendant demurred to the declaration, on the ground that there was no allegation of any wrongful act or omission on the part of the defendant. In the Superior Court the demurrer was sus-

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tained, and judgment was ordered for the defendant; and the plaintiffs appealed to this court.

F. Dodge, for the plaintiff, contended, among other things, that the discretion given by the Pub. Sts. c. 112, § 149, to the superintendent of a railroad drawbridge as to the passage of vessels, could be exercised within the fifteen minutes allowed by § 150 for the passage of trains before and after they were due, and that it was immaterial that the declaration did not set forth that the vessel was caught outside of that limit.

G. A. Torrey, for the defendant.

MORTON, C. J. The defendant corporation is authorized to maintain a bridge across Charles River, having two draws for the safe and convenient passage of vessels, and is required to "keep the draws in good repair, and open the same, and afford all proper accommodation to vessels having occasion to pass the same by day or night." St. 1847, c. 200. St. 1869, c. 352. In 1855 a general law was passed "regulating the passing of vessels through railroad drawbridges," and its provisions have been substantially continued to the present time, and are now found in the Public Statutes. St. 1855, c. 434. Pub. Sts. c. 112, §§ 148–155.

We must look to these provisions to ascertain the rights and duties of the railroad corporation, and of the owners or masters of vessels who have occasion to use the draw. The railroad company is required to appoint a competent superintendent, who shall have charge of the draw, shall at all hours of the day and night be ready to open it, shall decide in what order vessels are to pass, and furnish proper facilities for such passing, allowing a reasonable time for vessels to pass, having regard to the convenient and secure passage of engines and trains. But the statute contains the provision that "a railroad train shall be allowed fifteen minutes to cross a draw before and after it is due by its time-table, and any approaching train shall be allowed a further reasonable time to pass." Pub. Sts. c. 112, § 150. This is an important provision, designed to guard the safety of passengers on the railroad. By necessary implication, it forbids the opening of the draw at any time within fifteen minutes of the time when a train is due by its time-table, and within fifteen minutes after, unless the train which is due passes the draw. If within

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that time the master of a vessel applies to pass the draw, it is the duty of the superintendent to refuse to open it. He could not open it without violating the statute, and exposing himself and the railroad company to severe penalties.

In the case at bar, the declaration alleges that the plaintiff's vessel, having occasion to use the defendant's draw, by some negligence or accident for which the defendants were not responsible got her stern caught underneath the drawbridge, which was closed, and as the tide was rising she was thereby sunk; and that the master requested the superintendent to open the draw, and he refused. It does not allege in any way that this demand was made at a time when the owner or master of the vessel had a right to have the draw open. For aught that appears, it may have been made within fifteen minutes of the arrival of an approaching train, when the superintendent was forbidden by the statute to open the draw. The declaration does not contain sufficient averments to show that it was the duty of the superintendent to comply with the request and open the draw. It therefore shows no negligence for which the defendant is liable. *Judgment affirmed.*

FREDERICK A. LOCKWOOD *vs.* GEORGE W. TWITCHELL & another.

Suffolk. March 16, 1888. — May 4, 1888.

Present: MORTON, C. J., DEVENS, W. ALLEN, C. ALLEN, & HOLMES, JJ.

Promissory Note — Accommodation — Defence.

It is no defence to a promissory note that the maker signed it at the request of one for whose accommodation it does not appear to have been given, under his promise, express or implied, to indemnify the maker.

CONTRACT against George W. Twitchell and John Eliot, as former copartners under the name of George W. Twitchell and Company, on a promissory note payable to the order of the plaintiff, and signed by "Geo. W. Twitchell & Co." The answer of the defendant Eliot contained a general denial, and

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set up want of consideration and payment, and concluded as follows:

"And said Eliot further says that he signed said note as surety for his co-defendant, Twitchell; that the plaintiff knew at the time of taking said note that said Eliot was surety for said Twitchell upon said note; that subsequently the plaintiff, without the knowledge or consent of said surety, Eliot, made a valid and binding agreement with the principal debtor, Twitchell, to extend the time of payment of said note; whereby said defendant Eliot was wholly discharged from liability upon said note. And said defendant Eliot further says that he was induced to sign the note in suit by the fraud of the plaintiff and of Jotham Twitchell, and of the co-defendant George W. Twitchell; and that said plaintiff, Jotham Twitchell, and George W. Twitchell have secretly and fraudulently colluded together to charge said defendant Eliot on said note."

Trial in the Superior Court, before *Hammond*, J., who allowed the following bill of exceptions, alleged by the defendant Eliot:

"The defendant John Eliot offered to prove that said Lockwood is suing for the benefit of one Jotham Twitchell, and as his agent or trustee; that the note in suit was signed by said Eliot in the name of his firm of George W. Twitchell & Co., at the request of said Jotham Twitchell, and to enable him to raise money from said Lockwood, which was done to be given to said Jotham Twitchell's son, the principal defendant, George W. Twitchell, and to be used by the latter for his own private purposes, and not for the benefit of said Eliot, nor of the firm of George W. Twitchell & Co. But the judge ruled that these facts would constitute no defence for said Eliot, and ordered a verdict for the plaintiff."

C. Reno, for the defendant Eliot.

S. W. McCall, for the plaintiff.

MORTON, C. J. This bill of exceptions is brief and obscure. It states that the defendant Eliot "offered to prove that said Lockwood is suing for the benefit of one Jotham Twitchell, and as his agent or trustee; that the note in suit was signed by said Eliot in the name of his firm of George W. Twitchell & Co., at the request of said Jotham Twitchell, and to enable him to raise money from said Lockwood, which was done to be given to said

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Jotham Twitchell's son, the principal defendant, George W. Twitchell, and to be used by the latter for his own private purposes." We treat the case as if Jotham Twitchell were the plaintiff, having in some way become the owner of the note. If the offer of proof could be construed as meaning that the defendant Eliot signed the note for the accommodation and benefit of Jotham Twitchell, it would be a defence. But to sustain the defence that a note was signed for the accommodation of the plaintiff, it must appear that it was given for his benefit, and upon an express or implied promise that he would hold the maker harmless on the note. If it have this character, then, as between the plaintiff and defendant, it is without consideration. *Corlies* v. *Howe*, 11 Gray, 125. *Kellogg* v. *Barton*, 12 Allen, 527.

But it is not enough for the defendant Eliot to prove that he signed the note for the accommodation of George W. Twitchell at the request of Jotham Twitchell. In the absence of any agreement, the law will not imply a promise by Jotham Twitchell to indemnify the defendant, from the mere fact that he requested the defendant to sign the note for the accommodation of George W. Twitchell. The note was good in the hands of any *bona fide* holder; Jotham Twitchell was not a party to the note, and if he became the holder, he can enforce it. As we construe the exceptions, the offer of proof does not go far enough to constitute a defence. We cannot fairly enlarge the words "at the request of said Jotham Twitchell," so as to make them mean that the note was signed for his accommodation.

This construction of the exceptions is fortified by the fact that the answer does not allege that the note was signed for the accommodation of Jotham Twitchell. It alleges that the defendant Eliot "signed the note as surety for his co-defendant," and that he was induced to sign it by the fraud of the nominal plaintiff and of the two Twitchells.

We are therefore of opinion that the ruling of the Superior Court was correct. *Exceptions overruled.*

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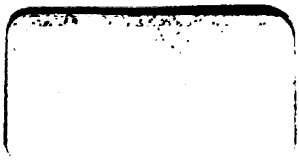

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